IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.616 OF 1994
(By Accused no.4 against the order of conviction)

Gopal Gangaram Kothavale — Appellant (Org.Accused No.4)

Vs.

The State of Maharashtra — Respondent

WITH

CRIMINAL APPEAL NO.21 OF 1995
(By State against the order of acquittal)

The State of Maharashtra — Appellant

Vs.

1. Nilkantha Arjun Kothavale
2. Shivram @ Bapu Budhaji Kothavale
3. Appa Gangaram Kothavale
4. Gopal Gangaram Kothavale
5. Ravindra @ Ravi Sitaram Kothavale
6. Sunita Appa Kothavale
7. Draupadi Gangaram Kothavale
8. Shankar Sitaram Kothavale — Respondents (Org.Accused Nos.1 to 8)

WITH

CRIMINAL APPEAL NO.22 OF 1995
(By State for enhancement of sentence)

State of Maharashtra — Appellant

Vs.

Gopal Gangaram Kothavale — Respondent (Org.Accd.No.4)

WITH

CRIMINAL REVISION APPLICATION NO.336 OF 1995

Hygiene Louis Phillips Petitioner

Vs.

1. Nilkantha Arjun Kothavale
2. Shivram @ Bapu Budhaji Kothavale
3. Appa Gangaram Kothavale
4. Gopal Gangaram Kothavale
5. Ravindra @ Ravi Sitaram Kothavale
6. Sunita Appa Kothavale
7. Draupadi Gangaram Kothavale
8. Shankar Sitaram Kothavale

9. The State of Maharashtra Respondents

Mr.S.R.Chitnis, Senior Advocate with Mr.Sachin B. Shetye for appellant in Cri.Appeal No.616 of 1994 and with Mr.P.D.Naik for Respondents in Cri.Appeal Nos.21 and 22 of 1995.

APP for State in all the matters absent.

Mr.M.H.Pereira with Mr.G.B.Tirodkar for petitioner in Criminal Revision Application No.336 of 1994.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.

17th, 18th, 21st & 22nd March, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J)

1. The above appeals and revision application have been filed against the judgment and order dated 30th September 1994 delivered by the Additional Sessions Judge, Sawantwadi in Sessions Case No.16 of

1987 convicting accused no.4 for offence under Section 304 Part II of IPC and sentencing him to RI for seven years and to pay a fine of Rs.1000/- in default RI for six months and acquitting the other accused being accused nos.1, 2, 3 and 5 to 8. Accused no.4 who was convicted by the aforesaid judgment has challenged the order of his conviction and sentence by filing Criminal Appeal No.616 of 1994. The order of acquittal is challenged in Revision Application by PW 7 Hygiene, who is the injured son and brother of the two persons who died in the incident in respect of which the accused were facing trial. Criminal Appeal No.21 of 1995 has been filed by the State challenging the order of acquittal of all the accused including accused no.4 who was acquitted for offence under Section 302 of IPC. Criminal Appeal No.22 of 1995 is filed by the State for enhancement of the sentence imposed on accused no.4 for offence under Section 304 Part II of IPC. All the aforesaid appeals were admitted. The State appeals against the order of conviction as well as sentence were admitted by this Court on 18/9/1995 on which date the same Bench directed the Criminal Revision Application filed by PW 7 to be heard along with Criminal Appeal No.21 of 1995 filed by the State

against the order of acquittal. That is how the said revision application is also placed on board along with the aforesaid appeals. Since all the appeals and the revision application are directed against the same judgment in respect of the same sessions case all the aforesaid proceedings are being disposed of by this common judgment.

2. The hearing of these appeals commenced on 4th March 2005 but this Court learnt today only i.e. on 17th March 2005 about the death of accused no.8 when Mr.Pereira appearing for the complainant in the revision application informed us that he had learnt that accused no.8 had died. We, therefore, enquired from his Advocate on record who confirmed that accused no.8 had died about three years ago and he would produce his death certificate on Monday, 21st March 2005. Advocate appearing for accused no.8 ought to have brought to our notice the said fact earlier and not waited until we enquired about it from him after the said fact was brought to our notice on behalf of the complainant. If accused no.8 has died, in that case the appeal filed by the State against him abates.

3. Before we proceed with the judgment in these appeals on merits it is necessary to deal with the application dated 16th March 2005 signed by the two Advocates on record appearing for all the accused and presented to this Court yesterday i.e. on 16th March 2005 at the fag end of the day just before rising at 4.40 p.m. by Shri S.R. Chitnis, submitting that the State appeals deserve to be dismissed. In the said application reference is made to the non appearance of the Public Prosecutor on 10th, 14th, 15th and 16th March 2005 and stated that the defence had concluded the arguments on 16th March 2005 at 2 p.m. and had already raised oral objections to the hearing of the arguments by Mr.Pereira who represents the petitioner who has filed Criminal Revision Application No.336 of 1994. It is stated that Mr.Pereira though had appeared as a special Public Prosecutor in the trial Court had not been appointed by the State in this Court. It is further stated therein that the criminal revision application had not been admitted and the only prayer in the revision application is for remanding the matter as required under Section 401(3) of Cr.P.C. and since no arguments had been advanced on behalf of the State by the Public Prosecutor, the State appeals are liable to be

dismissed.

4. We must make reference to the disturbing feature experienced by us in the course of hearing of these appeals right from the first day which has culminated into or been given finale by the above written objection presented by the senior counsel appearing for the accused. The senior defence counsel in the course of hearing of these appeals had interrupted the proceedings of this Court raising objections about the non appearance of the Additional Public Prosecutor in the matter and urging us not to give any hearing to Mr.Pereira who is appearing for the revision applicant, in spite of the fact that he was told again and again by us that by way of assistance we can hear any advocate and for that matter even appoint somebody to assist us. On Thursday, 10th March 2005 the learned counsel, to our utter surprise, went to the extent of telling us when we assembled for the afternoon session that he would not continue his arguments unless the Public Prosecutor comes to the Court and takes notes of the arguments advanced by him. We tried to persuade the learned counsel to continue his arguments in the absence of the Public Prosecutor hoping that he would

attend the court next day. But the counsel refused to resume his arguments for a span of 45 minutes that afternoon. At his instance we had even sent for the Public Prosecutor In-charge of that office but he also did not turn up. The counsel then went to the extent of forewarning us that on the next day if the Public Prosecutor did not attend this Court he would not continue his arguments. Still we showed our patience and tried to persuade him to continue his arguments though we were at that moment aware that his own conduct was nothing short of interfering or tending to interfere with this Court's judicial proceedings.

5. Mr.Chitnis was aware that the learned Public Prosecutor who was assigned these appeals was not keeping well and, therefore, had left. Neither he attended the Court thereafter nor any other Public Prosecutor was deputed to substitute him on behalf of the State in these appeals which demonstrates the lack of sense of any responsibility on the part of the office of the Public Prosecutor, High Court, Bombay. Mr.Chitnis had even submitted before us that the conduct of the office of the Public Prosecutor and especially the Public Prosecutor In-charge not

attending this Court in spite of the word sent to him amounted to contempt of this Court being oblivious that his own conduct in refusing to resume his arguments for 45 minutes in the afternoon of 10th March 2005 and also forewarning us that on the following day he would not continue his arguments unless the Public Prosecutor remains present in the case to take down notes of what is argued by him in the matter itself amounted to obstructing this Court's proceedings as envisaged under Section 2(c)(ii) of the Contempt of Courts Act. It is necessary to mention that right from the first day of hearing Mr.Chitnis was repeatedly telling us that this Court cannot hear Mr.Pereira who is appearing for the petitioner in criminal revision application filed against the order of acquittal. From the attitude of the learned Counsel it appears that he did not want Mr.Pereira to assist us in the matter on behalf of the complainant though that revision application was directed by the earlier Division Bench, while admitting the State appeals, to be placed along with the State appeals. Such attitude was not expected from a senior counsel, nay, not even from a junior member of the Bar.

6. The said application invokes section 401 of Cr.P.C. under which the High Court's powers of revision have been mentioned. We are quite aware of the limitations of this Court while exercising revisional jurisdiction under Section 401 of Cr.P.C. but the counsel conveniently ignored the earlier provisions of the same Code with reference to the powers of this Court which provide for procedure of hearing of appeals filed by both, the accused as well as by the State, which are embodied in Sections 385 and 386 of the Code. Though section 386 of the Code in an appeal against conviction empowers this Court to dispose of the appeals after perusing the record and hearing the appellant or his pleader if he appears and the Public Prosecutor if he appears, the same provision empowers this Court to dispose of the State appeals against the order of acquittal as well as for enhancement of sentence after hearing the accused if he appears either by dismissing or reversing the order of acquittal and find accused guilty and pass sentence on him according to law. The said provision does not even provide for hearing the Public Prosecutor in State appeals. Thus this Court is sufficiently empowered to dispose of the

appeals filed by the State whether against the acquittal order or for enhancement of sentence either in favour of the State or against it even in the absence of the Public Prosecutor after hearing the accused, if he appears. The said provisions have been interpreted by the Supreme Court in the case of Bani Singh v. State of U.P. reported in **1996 Cri.L.J. 3491**. It would be quite apposite to quote only the most relevant observations of the Supreme Court interpreting Sections 385 and 386 of the Code. It is observed in para 14 of the judgment as follows:

> "The plain language of S.385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and S.386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Ss.385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the

> Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial Court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial Court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record."

As observed earlier, Section 386 refers not only to the appeal against conviction but also against the order of acquittal and for enhancement of sentence filed by the State. Therefore, the application dated 16th March 2005 taking objection on behalf of the accused and seeking dismissal of the State Appeals on the ground of absence of the Public Prosecutor is misconceived and illegal and the same is rejected as being frivolous.

7. As regards the merits of this case the incident in which two persons Louis Fernandes and his

son Remi were murdered had taken place on 11th January 1987 between 4 and 4.30 p.m. in hissa no.3 of new survey no.196 being old survey no.376 situated in village Bilewadi, Taluka Sawantwadi of Dist.Sindhudurg. Deceased Louis, who was resident of Sawantwadi, was having about 125 acres of agricultural lands in village Bilewadi which is about 12 Kms. from the town of Sawantwadi which is a taluka place. He was having five sons out of whom one son by name Remi also had met homicidal death along with Louis himself on the date of incident. The other two sons who were present at the place and time of incident by name Jerome and Hygiene are injured eye witnesses who have been examined as PW 1 and PW 7 respectively. One more son of Louis by name Victor, who was not present at the place and time of incident, had gone to Banda police station to call the police after seeing his brother Remi dead and others injured at the place of incident.

8. There was dispute between deceased Louis and the accused persons as regards the right of way on the pathway which passed from the property of Louis viz. Hissa No.3, survey no.196 between village Uthawane and Bilewadi. Deceased Louis was owner of

survey nos.371 and 372 as well as part of old survey no.376 which was newly numbered as survey no.196. Out of the survey number 196 Louis was owner of hissa nos.2, 3 and 7 only. In the year 1985 Louis had planted mango graft trees in his survey nos.371 and 372. Some of the accused persons along with others had filed Regular Civil Suit No.80 of 1986 against Louis and his family members claiming easementary rights on the pathway which passes through hissa no.3 of survey no.196. The plaint in that suit has been produced on record by the prosecution at Exhibit 58. In the said suit an application for temporary injunction was also filed which was not granted by the Civil Judge Junior Division, Sawantwadi observing in his order dated 22/4/1986 that no specific document was produced to show prima facie easement and the notice was directed to be issued to the defendants. In the year 1986 Louis had applied to the office of the District Inspector of Land Records for carrying out survey of his lands being survey no.196, hissa nos.2, 3 and 7 which was fixed sometime in the month of May 1986. As the DILR authorities found that there were bushes on the land to be surveyed existence of which would not have enabled them to take proper measurements, no measurements

were taken in May 1986 which is clear from Exhibit 61 produced by the prosecution on the record. After the rainy season, Louis had again applied to the office of the DILR for taking survey of his aforesaid land pursuant to which he had received notice dated 1/1/1987 (Exh.62) fixing 16th and 17th January 1987 as the dates for taking measurements of his land. In the said notice it was made clear to him that since the said land is having bushes which obstruct taking measurements in the land, the measurements will not be taken unless and until the bushes are cleared. With a view to ensure that the bushes from the land in possession and ownership of Louis alone are removed for the purpose of facilitating taking of measurements in the land in question by DILR officers on 16th and 17th January 1987, deceased Louis hired the services of a retired Government officer PW 12 Gangaram Naik who had retired from the office of the District Inspect of Land Records, to show him the bushes required to be removed from his land. PW 12 Naik went to the said survey number along with Louis and Police Patil in the morning of 11th January 1987. After the area of the land under the ownership of Louis was demarcated by PW 12 Naik the said witness as well as the Police Patil left the place. Deceased

Louis along with his three sons deceased Remi, PW 1 Jerome and PW 7 Hygiene were in the said land on that day. They had engaged the services of three servants PW 6 - Phelix, PW 8 - Bapu and one Namdeo for removing the bushes from the said land. That work started at about 3 p.m. that afternoon. While the work was still in progress accused nos.6 and 7, who were two ladies, came there at about 4 p.m. and questioned Louis and his sons as to why they were removing bushes from their land. When the two ladies were questioning Louis and his sons, other accused i.e. accused nos.1 to 5 and 8 arrived there armed with solid bamboo sticks in their hands and started assaulting the deceased. Initial assault was given by accused no.3 with a stick on the head of Louis as a result of which he fell on the ground. When the three sons present there Remi, complainant Jerome and Hygiene went to rescue their father Louis, the sons were also assaulted by the accused. Complainant Jerome and PW 7 Hygiene took to their heels and took refuge in their farm house which was on the northern side of the place of incident in the same Hissa No.3. The said farm house is locally called as "manger". Louis and Remi were brutally beaten there. At about 6 p.m. Victor, son of Louis arrived at the place of

incident to find Remi dead. He went to the farm house where he told Jerome that their brother Remi was dead. Victor then went to Banda police station to inform them and call the police for help. The Sub Inspector Mahadik who was present there wanted to record the statement of Victor but he was in a trauma and was not in a position to give any statement. As it is he had no personal knowledge about the incident in question. Police, therefore made entry in the station diary which is produced on record at Exhibit 175 in which mention is made about the death of Remi due to the assault on him with a sickle locally known as "Palkoyta" which has a long wooden handle. The police, therefore, came to the place of incident at about 9 p.m. along with Victor and took brutally injured Louis, complainant Jerome and PW 7 Hygiene to the Sawantwadi Cottage Hospital leaving Remi, who was already dead, there. They reached hospital at about 10 p.m. Louis had died by the time they reached the hospital and, therefore, he was declared dead by the doctor in the said hospital before his admission. In the said hospital police took down the complaint of PW 1 Jerome which is produced on record at Exhibit 67 which mentions in detail as to how the incident took place and the assault which was seen by him until he

ran away and took shelter in the farm house. During the period after the incident and before the injured were removed to the hospital by the police, three villagers happened to go to the place of incident and see the injured who have deposed that injured had told them about the assault by accused no.4 and other Kothawales. It may be mentioned here that before Victor had reached at Banda police station, accused no.3 along with his wife had already gone to the said police station and lodged the complaint against Hygiene PW 7, deceased Louis, deceased Remi and PW 1 Jerome stating therein that they were assaulted by these people at about 4.15 p.m. as a result of which he received the injury on his back and his wife - accused no.6 received abrasion. Both of them were sent to the hospital for examination by doctor.

9. When the police went to the scene of offence at about 9 p.m. and took the injured to the hospital including deceased Louis who was that time breathing, the police had left Remi at the place where he was lying dead as there was no question of giving him any medical aid. Police Constable Londhe and others had returned to the scene of offence at about 12.30 in the night and stayed there through out the night as

Remi was lying dead. Following morning PSI Banda went to the place of incident and drew the inquest panchanama (Exh.17) on Remi's body and also drew spot panchanama (Exh.88). Heels of both the legs of Remi were chopped off. Both the dead bodies were sent for post mortem examination. The Investigating Officer Dy.S.P. Bhujangrao who was then Sub Divisional Police Officer, Sawantwadi, after directing the PSI Banda to draw inquest panchanama on the dead body of Remi, had left the spot for search of the accused in the adjoining jungle. Four accused being accused nos.1, 2, 4 and 5 were traced in the jungle who were taken into custody by the police at the place of offence. The I.O. drew the scene of offence panchanama (Exh.88). From the place of incident pairs of leather slippers of the deceased and the witnesses were seized. Four big and small stones having blood on them were also attached under the spot panchanama. There was one broken denture found at the place of offence which was belonging to deceased Louis. Same day accused no.3 was also arrested. The accused were sent for medical examination after their arrest. The house of accused nos.1 to 5 was searched. The family members of the accused had produced the clothes which were washed

but had some stains on them. Those clothes were attached under panchanamas (Exhs.89 to 92). Same day accused no.4 had made a statement and volunteered to produce sickle (palkoyta) and wooden stick concealed by him in the shrubs by the side of the pathway going to Bilewadi. Accused nos.1, 2, 3 and 5 had also volunteered to produce the bamboo sticks which were hidden by them after the incident. They were seized under recovery panchanamas. On 14/1/1987 two lady accused, accused nos.6 and 7, were arrested. Accused nos.1 to 7 were sent to the Cottage Hospital, Sawantwadi for taking their blood samples. On the same day supplementary statements of complainant Jerome and PW 7 Hygiene were recorded. Their clothes were attached under panchanamas, Exhs. 94 and 95 respectively. Accused no.8, Shankar Kothawale was arrested on 14/1/1987. On 15/1/1987 blood samples of complainant Jerome and PW 7 Hygiene and of accused no.8 were also taken. Various seized articles, the blood samples of the witnesses and the accused were sent to the office of CA at Pune vide forwarding letter dated 18/1/1987 which had reached that office on 19/1/1987. The CA reports dated 30th June 1987 (Exhs.183 to 191), dated 31/7/1987 (Exhs.192 to 194) and dated 30/10/1987 (Exhs.195 & 196) were received.

After completion of the investigation charge-sheet was filed in the Court of the Judicial Magistrate, Sindhudurg at Sawantwadi on 25/2/1987 against accused nos.1 to 8. Subsequently on 4/4/1988 (Exh.197) letter was sent to the District Inspector of Land Records requesting him to draw the map of scene of offence. The map drawn by the District Inspector of Land Records of the scene of offence is produced at Exhibit 144.

10. After committal of the case to the Sessions Court charges were framed against all the eight accused persons by the Addl. Sessions Judge, Sawantwadi for offences firstly under Section 302 read with Section 34 of IPC for the murder of Louis Fernandes, secondly for offence under Section 307 read with Section 34 of IPC for assault on complainant Jerome and PW 7 Hygiene, thirdly for offence under Section 324 read with Section 34 of IPC for causing hurt to PW 7 Hygiene, fourthly for offence under Section 324 read with Section 34 of IPC for voluntarily causing hurt to complainant Jerome, fifthly for offence of criminal trespass under Section 447 read with Section 34 of IPC. Sixthly for offence under Section 147 of IPC, seventhly for

offence under Section 148 of IPC , eighthly for offence of murder of Louis and Remi under Section 302 read with Section 149 of IPC, ninthly for offence under Section 324 read with Section 149 of IPC for voluntarily causing hurt to complainant Jerome and lastly for offence under Section 307 read with Section 149 of IPC for assault on PW 7 Hygiene. All the accused pleaded not guilty to the said charges framed against them.

11. On behalf of the prosecution 18 witnesses have been examined out of whom four are eye witnesses to the incident including two injured i.e. PW 1 complainant Jerome and PW 7 Hygiene. There are four panch witnesses i.e. PW 2 Pasko D'Souza for inquest panchanama of dead body of Louis (Exh.85) and PW 3 Salu Alameda for inquest panchanama of dead body of Remi (Exh.87). PW 3 had also acted as panch for the scene of offence panchanama (Exh.88). PW 4 is Inas Parera who had acted as panch for the recovery of the clothes of accused nos.2 and 4 (Exh.89), recovery of clothes of accused no.8 (Exh.90), recovery of clothes of accused No.1 (Exh.91) and recovery of clothes of accused no.5 (Exh.92). PW 5 is Peter Lemos who acted as panch for the recoveries of weapons at the instance of the accused under Section 27 of the

Evidence Act i.e. Exhibit Nos.102 to 111 from accused nos.1 to 5. PW 4 - Inas Parera, PW 9 - Prabhavati @ Mangala and PW 10 - Kamil Fernandes had visited the place of incident after the incident to whom oral dying declarations were made by Louis and Remi that they were assaulted by accused no.4 and other Kothawales. PW 11 is Krishna Sawant, Police Patil of village Bilewadi. PW 12 is Gangaram Naik, private surveyor engaged by deceased Louis for pointing out the boundaries of deceased's survey no.196 hissa no.3. PW 13 is Ravindra Gawade, Surveyor from the office of DILR, Sindhudurg who had drawn map (Exh.144). PW 14 is Dr.Sandip Vanjare, Medical Officer, Primary Health Centre, Banda who had performed autopsy on the dead body of Remi and had also examined accused nos.1, 2, 3, 4 and 6. PW 15 is Dr.Madhukar Sangle, Medical Officer attached to Cottage Hospital, Sawantwadi who had performed autopsy on the dead body of Louis. PW 16 is Police Constable Uttam Londhe attached to Banda Police Station. PW 17 is the Investigating Officer Shinde who was then Sub Divisional Police Officer at Sawantwadi. Lastly PW 18 is Dattaprasad Puranik, Advocate's clerk who has proved the bail application (Exh.215) being Criminal Misc. Application No.12 of

1987 filed on behalf of the accused in the Sessions Court. On behalf of the prosecution apart from panchanamas, FIR, CA reports, post mortem notes etc., some other documents were also produced being the certified copy of the plaint in the earlier suit between the parties, the applications filed by deceased Louis to DILR for survey of his lands and the notices issued by the office of the DILR. There is also partition deed produced on behalf of the prosecution between Louis and his relatives, scene of offence map and the medical certificates. There are also extracts from the revenue record like 7/12 extracts, village form no.6 and Akarphod Patrak.

12. On behalf of the defence one witness Tukaram Shinde has been examined and some documents like Exhibits 76 to 79 and 87 about 145 proceedings initiated by the accused, Akarphod patrak etc. are produced. Accused had also filed written statements (Exhibits 217 to 223) by way of defence. Written say of the accused filed by accused nos.1 to 6 and 8 respectively is on the one hand of total denial of the incident in question and on the other hand it is alleged that in the incident which took place at 4 p.m., accused no.3 and his wife were assaulted when

they were passing through the pathway on hissa no.3 of survey no.196, which was in the ownership and the possession of deceased Louis and his family. In the cross-examination of the prosecution witnesses the defence of the accused is that when the deceased was questioned about the cutting of trees from the land of the complainant, the accused were beaten and thereafter the incident took place at 5.30 p.m. when a mob of people from the village had gathered and there was free fight.

13. After considering the evidence on record the Addl. Sessions Judge by his impugned judgment and order acquitted all the accused except accused no.4 of all the charges framed against them on the ground that the accused were exercising their right of private defence of person as well as property. Curiously the trial Judge has held that the assault on deceased Louis is not proved. Accused no.4 has been convicted for offence under Section 304 Part II of IPC holding that he had exceeded the right of private defence in committing murder of deceased Remi. He was, therefore, sentenced to RI for seven years and to pay a fine of Rs.1000/- in default RI for six months. Aggrieved by the said judgment and

order of the trial Court accused no.4 has challenged his conviction and sentence under Section 304 Part II of IPC and the State has challenged the order of acquittal of all the accused nos.1 to 8 in respect of all the charges framed against them and has also filed appeal for enhancement of sentence imposed on accused no.4 for his conviction under Section 304 Part II of IPC as being inadequate. The P.W. 7 had filed Revision Application challenging the order of acquittal.

14. We heard Mr.Chitnis at great length on behalf of all the accused in all the three appeals, two appeals filed by the State and one filed by accused no.4 against his conviction. Since the APP who was in charge of these appeals had remained absent due to health problems and in his absence no other public prosecutor is appearing in these appeals in spite of messages sent and requests made to the in-charge Public Prosecutor, we heard Mr.Pereira who was appearing in Criminal Revision Application filed by PW 7, the son of deceased Louis who had very precisely and briefly presented the relevant facts and also cited before us absolutely relevant case law on the issues which arose in these appeals. We

cannot but highly appreciate the assistance rendered to us by him without any exaggeration and without being in any way irrelevant either on the points of facts or on the points of law which arose in the case. Thereafter we heard Mr.Shetye on behalf of the accused in rejoinder. We had also perused the oral as well as documentary evidence which is produced on record as well as went through the reasoning of the trial Judge with the assistance of the counsel.

15. On behalf of the accused it is argued that initially accused no.3 was assaulted when the accused raised objection and questioned the deceased and the complainants why the trees of the land of accused were being cut. Secondly, it was argued that the accused had the right to defend their person as well as property and whatever was done by the accused was in defence of person and property. The counsel for the accused tried to highlight the simple injuries which were noticed on the persons of the accused and argued firstly that the accused had a right of private defence of their person and secondly he argued that the injuries on the accused persons not having been explained by the prosecution, the prosecution case is liable to be disbelieved as the

genesis of the incident in question has not come on record. Thirdly, relying on the case of the prosecution that initially accused no.6 questioned the deceased and the complainant why they were cutting trees from their land, it was argued that the accused had a right of private defence of their property. It was also argued that the manner in which the incident had taken place has not been brought on record by the prosecution. Reliance is placed on the complaint lodged by accused no.3 at Banda police station at about 6.30 p.m. on the date of the incident stating therein that he was assaulted by PW 7 Hygiene at 4.15 p.m. on that day when accused no.3 along with his wife accused no.6 wanted to go from their village Bilewadi to Uthavane which is on the northern side of village Bilewadi and argued that accused no.3 who had reached Banda Police Station even before Victor, son of deceased Louis had reached there, accused nos.3 and his wife accused no.6 could not have been party to the assault on the deceased and the prosecution witnesses. Relying on the station diary entry made at Banda Police Station when Victor, son of deceased Louis had gone to inform the police and call the police for help to remove the injured to the hospital, it was argued that said

entry (Exh.175) at Banda police station was FIR in which names of the accused were given. It was argued that the deceased and the complainant himself had been assaulted by crowd of 50-60 people from village Bilewadi at about 6 p.m. Counsel for the accused also criticised the seizure of blood stained clothes from the house of the accused contending that the ownership of those clothes has not been proved when they were seized in the absence of the accused from their house after the accused were arrested. The recovery of blood stained sickle and the sticks at the instance of the accused has been challenged on the ground that weapons were recovered from open places. In order to substantiate the defence of right of private defence of property heavy reliance was placed on behalf of the accused on the 145 proceeding which was pending between deceased Louis and the accused persons.

16. Deceased Louis and his family are the residents of town Sawantwadi, while his lands admeasuring about 125 acres are situated in village Bilewadi which is about 12 Kms. from Sawantwadi. The incident had taken place in hissa no.3 of new survey no.196 which was bearing old survey no.376.

From the documents produced on record there can be no doubt that there were some disputes between the parties with regard to the land and, therefore, the relations between the two sides were strained. Complainant PW 1 Jerome has deposed that until 1985 relations between the family of Louis and the accused were cordial but when in July 1987 mango graft trees were planted in other survey nos.371 and 372 and compound wall was put on four sides, the accused became enemical with deceased Louis as the pathway leading to Uthawane from Bilewadi from Survey Nos.371 and 372 was closed. Both the sides had lodged complaints at the police station. The accused had filed civil suit against deceased Louis. The copy of the plaint in the said civil suit has been produced at Exhibit 58. PW 1 has further deposed that there is another pathway to go to Bilewadi from village Uthawane which passes from survey no.196 hissa no.3 where the incident had taken place and the family of Louis had no grievances for the use of that pathway. PW 7 Hygiene son of deceased Louis has also deposed in his evidence that the relations with the accused had become strained because the pathway from their other lands was closed when the mango trees were planted in survey nos.371 and 372 as a result of

which criminal cases were filed against each other by both sides. Even 145 proceedings were also initiated by the police at the instance of the accused due to the criminal complaints filed by both sides at Banda police station.

17. The incident in question appears to have taken place because deceased Louis wanted to take measurements of his land in survey no.196. Survey no.196 is divided in ten hissas out of which hissa nos.2, 3 and 7 were in the ownership and occupation of deceased Louis and his family. In the year 1986 the survey of the said land was fixed by the office of the DILR on 27th and 28th May 1986 as per the notice dated 15/5/1986 served on deceased Louis which is produced at Exhibit 60. On that day measurements could not be taken as DILR officers found that there were thick bushes and the measurements could not be taken because of the existence of thick bushes which is clear from Exhibit 61 which is a statement dated 28/5/1986 of deceased Louis stating therein that because of the existence of bushes in the land the survey could not be carried out. After the rainy season of 1986 deceased Louis again applied for carrying out survey of his lands in survey no.196,

hissa nos.2, 3 and 7. On his application notice was issued by the office of DILR dated 1/1/1987 fixing 16th and 17th January 1987 for the survey of those lands. It is important to note that in the said notice (Exh.62) it is stated in the note that the measurements would not be taken in case the bushes were existing in the said lands.

18. Before 16th and 17th January 1987 i.e. the dates fixed by the office of the DILR for taking measurements of the land, deceased wanted to remove bushes from the land. In order to ensure that bushes from his land which would obstruct the taking of measurements are removed, he engaged the services of a retired officer from the office of DILR i.e. PW 12. Accordingly PW 12 Gangaram Naik, a private surveyor, came to land survey no.196 for the purpose of showing the areas and places on the lands of Louis from where bushes should be removed. At the instance of deceased Louis even police patil of the village PW 11 Krishna Sawant was present when PW 12 Naik showed the places from where bushes were required to be removed to facilitate taking of measurements. PW 12 showed the bushes which were needed to be cleared from the land in occupation of deceased Louis for the

purpose of survey of the land in the forenoon of 11th January 1987 which is the date of the incident. After PW 12 showed the area he had lunch in the farm house of Louis along with Louis, his sons and police patil and thereafter they left that place. At 3 p.m. deceased Louis along with his three sons, deceased-Remi, complainant-Jerome PW 1 and PW 7 Hygiene and three other workers engaged for the said purpose i.e. PW 6 Phelix, PW 8 Bapu and one Namdeo started removing the bushes from the said land. When the work of removing bushes was in progress at about 4 p.m. two ladies, accused nos.6 and 7, followed by other six male accused i.e. accused nos.1 to 5 and 8 came to the place of incident. Accused no.6 questioned Louis and his sons as to why they were removing the trees from their land. When the talk was going on accused nos. 1 to 5 and 8 came rushing armed with sticks in their hands. All the witnesses have deposed about the initial assault made by accused no.3 on the head of Louis with stick as a result of which he fell down on the ground. The sons of Louis went to their father’s rescue but all the accused started assaulting the three sons of deceased Louis. All the three sons, therefore, tried to run away to escape from further assault on them by the

accused persons. While PW 1 Jerome and PW 7 Hygiene took shelter in their farm house deceased Remi fell down because of the assault made on him while running away. When Remi fell down accused no.4 turned back and picked up sickle which was left by PW 6 on the ground and chopped off the heels of both the legs of Remi as a result of which the blood from his body oozed out and after some time Remi died. At that time the accused had assaulted the deceased Louis also with sickle as well as sticks.

19. Initial assault by accused no.3 with stick on Louis and on the sons of Louis including Remi has been deposed to by all the four eye witnesses to the incident. So far as the assault with a sickle chopping off the heels of Remi is concerned, the same has been deposed to by PW 6 Phelix Fernandes and PW 8 Bapu. They were engaged on that day by Louis for the purpose of clearing bushes from the land of the complainant's family. P.W.6 has deposed that when accused nos.6 and 7 enquired as to why the trees were being cut from their land, he dropped the sickle from his hand on the ground. Accused no.3 gave a stick blow on the head of Louis. Thereafter other accused were also assaulting Louis, deceased Remi as well as

PW 1 Jerome and PW 7 Hygiene. The accused continued to assault deceased Louis with sticks and stones even after he fell on the ground. The ladies were pelting stones on Louis after he fell down. When Louis fell down his sons Jerome, Hygiene and Remi started running away from the spot. That time accused nos.1 to 5 started chasing Jerome, Hygiene and Remi. They were also pelting stones on them. While running Remi fell on the ground and thereafter accused no.4 Gopal picked up sickle (palkoyta) which was dropped by him on the ground and assaulted Remi on his legs. The assault with sickle on the legs of Remi was also witnessed by PW 8 Bapu Korgaonkar. He has also deposed that after the boundaries were shown to them, which were fixed by the surveyor, they started clearing the small bushes from the place with the help of palkoytas. At that time accused nos.6 and 7, the wife and mother of accused no.3, came there and started enquiring and abusing Louis. Immediately accused nos.1 to 5 came there with sticks in their hands and started assaulting deceased Louis. When the sons of Louis went to rescue their father from the assault the accused started assaulting them also and when the sons started running away they were chased by the accused persons and when Remi fell down

on the ground while running away the accused no.4 Gopal lifted one palkoyta lying on the ground and gave blows on both the legs of Remi. They also ran away after seeing assault with palkoyta on deceased Remi. In this connection it is relevant to point out that PW no.6 has deposed that when accused no.4 Gopal lifted palkoyta and assaulted Remi on his legs, Gopal's mother pointed at him and said that PW 6 Phelix is also from the community of Louis and, therefore, her son should catch hold of him also. Naturally PW 6 Phelix had to flee from the spot after hearing accused no.4's mother telling her sons to catch hold of Phelix. When Phelix started running away the other independent witness PW 8 Bapu also got frightened and he also ran away from the place of offence. PW 8 has deposed that he and Namdeo, third servant, employed by Louis family on that day for clearing bushes, got frightened and out of fear ran away from the spot.

20. All the four eye witnesses including two injured eye witnesses have deposed about the assault made by accused nos.1 to 5 on two deceased persons and two eye witnesses PW 1 and PW 7 and their names have been mentioned in the FIR lodged by PW 1 Jerome

same night after he was removed to the hospital by the police. By the time the injured were taken to the Cottage Hospital, Sawantwadi it was 10 p.m. Within short time the detailed complaint of injured Jerome was recorded in the hospital itself on the basis of which the crime came to be registered immediately thereafter. The names of all the accused including two ladies have been mentioned in the FIR itself. Pursuant to the said complaint and registration of crime, accused nos.1 to 5 came to be arrested following morning. It is pertinent to note that accused nos.1, 2, 4 and 5 were arrested that morning from the adjoining forest as they were not in their houses. Accused nos.6 and 7 being ladies were arrested on 14th January 1987. Accused no.8 was not arrested earlier because his name was mentioned as Bapu in the complaint and Jerome in his supplementary statement recorded on 14th January 1987 had given the full name of accused no.8. So far as accused no.8 is concerned he is reported to have died and the appeal abates as against him. But for the purpose of completing the narration it may be mentioned that his name has been mentioned and role has been assigned to him for assault by two out of four eye witnesses i.e. complainant Jerome PW 1 and his brother Hygiene PW 7.

Accused no.8 came to be arrested on 14th January 1987 after recording the supplementary statement of complainant PW 1 wherein it was pointed out that Bapu referred to in the complaint was accused no.8.

21. It would be desirable at this stage to refer to the injuries suffered by two deceased persons though the fact that both of them met with homicidal deaths was not in issue in the lower court as well as in this court and looking to the injuries of the two deceased persons it can never be doubted that both of them had received homicidal deaths and the soles of both the legs of one of them i.e. Remi were chopped off. PW 14 Dr.Vanjare who was at the relevant time Medical Officer attached to Primary Health Centre, Banda had performed post mortem examination on the dead body of Remi, son of Louis Fernandes in Cottage Hospital at Sawantwadi on 12/1/1987. He had noticed following seven external injuries on his person:

> (1) Amputation just above right ankle joint attached with small skin leg incised wound 7" x 4" x 3".
>
> (2) Left foot incised wound over heal total amputation of heal. Calcanem absent 5" x 3" x 2".
>
> (3) Contusion over left arm 2" x 1".

(4) Contusion over the left forearm 3" x 1".

(5) Abrasion over wrist joint 3"x2".

(6) Multiple contusions over back transversely 20 in No. 12" x 2" to each other.

(7) Abrasion over left infrascapular region 2" x 1".

The doctor has opined that the aforesaid injuries were ante mortem and the probable cause of death was haemorrhage, shock due to multiple injuries. According to the Medical Officer injury nos.1 and 2 were sufficient in the ordinary course of nature to cause death. He has deposed that both those injuries which were cause of death were possible by sharp cutting instruments. He was shown palkoyta (article no.A) which was recovered at the instance of accused no.4 to whom assault on the legs with palkoyta was attributed by two eye witnesses i.e. PWs 6 and 8 who were not relatives of the deceased but were engaged for the work of clearing the bushes from the land of the deceased on the date of the incident. He has opined that the first two injuries i.e. amputation of right ankle joint with incised wound and the left foot incised wound over heal resulting amputation of the heel were possible by use of palkoyta (article A) before the Court.

22. On the basis of the aforesaid medical evidence read in the context of the ocular evidence the trial Judge has held Remi having met with homicidal death at the hands of accused no.4 alone on the ground that the Medical Officer has deposed that injury nos.1 and 2 i.e. chopping off of the right ankle and the heel of left foot of Remi were sufficient in the ordinary course of nature to cause death ignoring that according to the said doctor the probable cause of death was haemorrhage and shock due to multiple injuries. It would be quite pertinent to mention here that at serial no.6 of the list of external injuries mentioned in column 17 of the post mortem report reference is made to multiple contusions over the back transversely 20 in number of 12" x 2" and there is also ocular evidence that all the accused were assaulting Remi with sticks. The Medical Officer has opined that the rest of the injuries that is barring injury nos.1 and 2 which caused amputations to his two legs, were possible by the blows given by hard and blunt substances like the wooden sticks i.e. article nos.B to F, the five sticks which were recovered under Section 27 of the Evidence Act at the instance of accused nos.1 to 5.

Those sticks were recovered on 13/1/1987 at the instance of the accused i.e. on the next day of the arrest of accused nos.1 to 5 which took place on 12th January 1987. Those sticks as per recovery panchanamas (Exhs.107 to 111) were stained with blood which as per the CA report dated 31st July 1987 (Exh.193) were found stained with human blood. One of the reasons for which the trial Judge has applied Section 304 Part II of IPC against accused no.4 is that the injury caused with palkoyta on the body of Remi was not caused on the vital part of the body and with the immediate medical aid given to him he would have survived. Here the learned Judge was oblivious and had completely ignored the opinion of the doctor for cause of death which is given as haemorrhage and shock due to multiple injuries and not only because of the leg injuries though the Medical Officer has further opined that even the first two injuries resulting in the amputation of the right ankle and left heel of Remi were sufficient in the ordinary course of nature to cause his death. Having stated so in the examination-in-chief the doctor seems to have fallen in error when in his cross-examination he stated that injury nos.3 to 7 are not sufficient to cause death. What the doctor must have meant was

that injury nos.3 to 7 were not individually sufficient to cause death.

23. The learned Judge also ignored the twenty multiple contusions noticed by the doctor on the back of Remi which were transversely admeasuring 12"x2" each. Those multiple injuries on the back which must have been caused after he fell down were also sufficient to cause his death as opined by the Medical Officer himself. This had to be read in the context of the ocular evidence in which the assault is attributed to all the accused even on Remi with sticks. It is pertinent to note that as per the evidence of all the four eye witnesses seeing their father collapse after the assault by all the accused three sons started running away towards their farm house for shelter and while running away Remi fell down. That time they were being chased by all the male accused persons. While PW 1 Jerome and PW 7 Hygiene could escape by going to their farm house Remi fell down as deposed to by the eye witnesses. Surely the accused who were chasing them with sticks in their hands would not spare Remi after he fell down. Out of those accused, accused no.4 picked up palkoyta which was lying around dropped by PW 6

Phelix and chopped off his legs. It requires no eye witness to say that the other accused who were chasing Remi with sticks in their hands must have assaulted him after he fell down especially when the doctor has noticed apart from other injuries, 20 contusions on the back of Remi which are possible by stick blows given after he fell down. If Remi was assaulted after falling on the ground and 20 contusions are caused on his back from where the back bone (vertebra) passes, whether before or after his ankle and heel were amputed, he was very likely to die because of the assault with sticks causing 20 contusions on his back or at least his death would be accelerated.

24. So far as injuries on Louis are concerned the prosecution has examined PW 15 Dr.Sangle who was the Medical Officer attached to Cottage Hospital at Sawantwadi. He had examined two witnesses PW 1 and PW 7. He had also performed post mortem examination on the dead body of Louis on 12/1/1987. He found following 16 external injuries on the person of Louis:

(1) Incised wound over right parietal region

2" x 1".

(2) Unshaped incised wound over saghal line post aspect 3" x 1" x 1/2".

(3) Incised wound over occipital 2" x 1" x 1/2".

(4) Incised wound over left parietal region 2" x 1/2" x 1/2".

(5) Incised wound over forehead 1" x 1/2" x 1/2".

(6) Contusion over neck posterior aspect 2" x 1".

(7) Contusion over right shoulder 2" x 1".

(8) Compound fracture Radius and ulna lower 1/3 near wrist. C open wound 2" x 1" bone deep.

(9) Incised wound over 3rd web space 2" x 1/2" x 1/2".

(10) Incised wound over right right thigh 1" x 1/2".

(11) C.L.W. over right leg (shin of tibia) 4" x 1/2" x 1/2".

(12) Contusion over left shoulder 2" x 1".

(13) Contusion over left forearm 2" x 1".

(14) Fracture of second, 3rd meacarpal.

(15) Incised wound over left leg over skin of tibia 2" x 1" x 1/2".

(16) Contusion over right scapular and intrascapular region right 2 in no. (1) 9" x 1", (2) 5" x 1", (3) 6" x 1".

The above injuries were according to the doctor ante mortem caused by hard and blunt object. There are

number of incised wounds found on the body of Louis. On internal examination following injuries were noticed:

(1) Linear fracture of skull from frontal bone over right parietal bone 6" in length.

(2) Haematoma over left temporal 3" in diameter.

External injury nos.1 to 5 which are incised wounds were caused by sharp object. The cause of death of Louis has been given as shock due to head injury and multiple injuries over the body. He has further deposed that injury nos.1 to 5, 9 and 15 in column no.17 were possible with sharp cutting weapon due to blow given by palkoyta like Article No.A before the Court. According to the Medical Officer the rest of the injuries were possible as a result of blows given by hard and blunt object like wooden sticks article nos.B to F before the Court. He has further deposed that linear fracture of skull from frontal bone over right parietal bone was possible as a result of blow of wooden sticks given with force. According to him internal head injuries mentioned in column no.19 of the post mortem report under the sub-heading of skull

and brain are two distinct injuries and both those injuries were possible as a result of one blow by hard and blunt object. He has deposed that haematoma over left temporal low found in the brain is sufficient to cause death in the ordinary course of nature. In his cross-examination this Medical Officer has stated that the linear fracture of skull from frontal bone over right parietal region could be caused if a blow was given by a sharp cutting weapon. He has further stated that injury no.1 in column no.17 of the post-mortem report is incised wound over right parietal region. Then he has admitted that there was no other external injury on the right parietal region except injury no.1 and the linear fracture of skull from frontal bone over right parietal region may be the result of injury no.1 in column no.17 of the post-mortem report in answer to question put to him in cross-examination. But he has clarified it by adding immediately and asserting that it was not necessary that injury in the form of linear fracture of skull may be a result of incised wound over right parietal region i.e. injury no.1 in column no.17. In other words according to him the internal injury in the form of linear fracture of skull was not necessarily caused as a result of

incised wound which was found not on the upper portion of the head but over right parietal region.

25 This assertion of the medical officer has to be read in the context of the situation of the external injury no.1 which was in the form of incised wound on the right parietal region while internal injury in the form of linear fracture of skull was on the upper portion of the head which must have been caused when accused no.3 had initially assaulted Louis with stick on his head. The linear fracture being on the upper side of the skull may not have been caused due to incised wound on the right parietal region. In other words the internal injury which was a linear fracture of skull could have, and in the context of the uniform evidence of the eye witnesses must have been caused by the blow given with stick on the head of Louis by accused no.3 as deposed to by all the eye witnesses. That was the first assault made by accused no.3 or any accused for that matter when they arrived on the scene armed with weapons like solid sticks. Those sticks which were recovered at their instance are before the Court and perusal of those sticks would show that if a hard blow is given with those sticks, which are very solid

and thick ones, on the head of Louis there would be fracture of skull as shown in medical evidence. If such blow had been given on the upper part of the head with weapon like palkoyta it would have left its mark in the form of external injury as it is on the right parietal region of Louis. Inspite of these assertions of the Medical Officer simply because there is admission by him in the cross-examination about the possibility that linear fracture of skull might be the result of injury no.1 i.e incised wound, the defence has contended and the trial Court has held that there is no head injury on Louis caused by stick blow as attributed to accused no.3 by all the eye witnesses. Holding that the medical evidence does not support or corroborate the ocular evidence with regard to the blow dealt on the head of Louis by accused no.3 the trial Court has surprisingly held that assault on Louis in the said incident is not proved. In our opinion such view can be taken only by perverse thinking or reasoning.

26. Though Louis had received as many as 16 external injuries on his person and there was linear fracture of skull of the frontal bone and haematoma over left temporal region, the trial Judge has held

in paragraph nos.70 and 106 of the judgment that the prosecution had failed to prove that all or any of the accused is responsible for causing death of Louis on the ground that there is no mention in the complaint of a blow causing linear fracture of the skull of Louis because the complaint does not mention that accused no.3 dealt a blow of stick on the forehead or top of head of Louis Fernandes. The trial Judge has observed that what is alleged in the complaint is merely that accused arrived there armed with sticks and they started to give stick blows on complainant's father and when three brothers tried to rescue their father the accused gave them stick blows and their father collapsed on the ground. He has further observed in the said paragraph that there is mention in the complaint that when accused nos.3' wife and mother were asking the complainant's party as to why they were cutting trees standing in their land, other accused arrived and gave stick blows to Louis Fernandes but there is no mention that accused no.3 dealt stick blow on the head of Louis. As observed earlier, the trial Judge has first of all obviously and clearly erred in holding that the fracture of the skull of Louis was not as a result of stick blow given by accused no.3 on the head of Louis

to begin with. Secondly he has completely ignored the evidence of the eye witnesses who have deposed that accused no.3 assaulted Louis with stick on his head. Even the complaint as observed by the trial Judge in paragraph 70 of the judgment does mention that the accused arrived at the place of incident armed with sticks and started to give stick blows on his father as a result of which Louis collapsed on the ground. It may be mentioned here that so far as assault on Louis is concerned there is mention of the same in the complaint itself that accused started assaulting Louis with sticks. The complainant PW 1 Jerome has deposed that accused nos.1 to 5 and 8 began to beat his father Louis. Therefore they i.e. the sons rushed to rescue their father. As all the accused started beating the brothers they ran away leaving the palkoytas from their hands on the ground. Then another son PW 7 Hygiene has deposed that accused no.3 had given a stick blow on the head of his father and rest of the accused had also started assaulting Louis by giving stick blows. When the brothers went to rescue their father the accused started assaulting the witnesses and the deceased Remi. Similarly PW 6 Phelix has deposed that accused nos. 1 to 5 came there armed with wooden sticks in

their hands and accused no.3 gave stick blow on the head of Louis. He has further deposed that other persons also started giving stick blows on the persons of deceased Louis, PW 7 Hygiene, PW 1 Jerome and deceased Remi. Then there is evidence of PW 8 Bapu Korgaonkar. He has also deposed that accused nos. 1 to 5 came running on the spot with wooden sticks in their hands and accused no.3 gave stick blow on the head of deceased Louis and also assaulted the three sons that is deceased Remi, PW 1 Jerome and PW 7 Hygiene. When the assault took place all of a sudden after six male accused persons came running and started assaulting Louis and others with sticks in their hands, what better evidence could have been given by the witnesses two of whom were themselves assaulted and one of them seriously injured and the other two who were employed for the work on that date had to run away after seeing that the accused started assaulting the victims even with palkoytas picked up from the place of incident. When number of persons start assaulting one or more persons all of a sudden no witness is expected to give details of each and every assault made by any one member of the unlawful assembly consisting of five or more persons. All the witnesses without omissions in the complaint or

previous statements have spoken of the assault on Louis with sticks by all the male accused. Three out of four witnesses have attributed assault to accused no.3 on the head of Louis. Any Judge equipped with basic knowledge of law cannot be unaware or plead ignorance of the law which is well settled that when assault is made by members of the unlawful assembly it is not necessary that the witnesses should be in a position to explain every injury on the victims. It would require an unusual and extraordinary courage on the part of the Sessions Judge, in the context of evidence which is on the record in this case, to hold that, though it is established that the accused gave stick blows to deceased Remi and Louis, the homicidal death of Louis, which took place and which could not have taken place in any incident other than the incident in question, was not proved against any of the accused.

27. It would be relevant at this juncture to refer to some of the judgments of the Supreme Court which are applicable in this case. In the case of Bhajan Singh v. State of U.P. reported in **1974 Cri.L.J. 1029 = AIR 1974 SC 1564** it was observed by the apex Court as follows:

> "Even assuming that unlawful assembly was formed originally only to beat, it is clearly established in the evidence that the said object is well-knit with what followed as the dangerous finale of, call it, the beating. This is not a case where something foreign or unknown to the object has taken place all of a sudden. It is the execution of the same common object which assumed the fearful character implicit in the illegal action undertaken by the five accused."

In our view the assault on the head of deceased Louis by the accused is squarely established by the prosecution. Even assuming that the assault on head by accused no.3 with stick is not proved because of the assumed inconsistency with the medical evidence as held by the trial Judge, homicidal death of Louis in the incident in question which took place on the date, time and place mentioned and proved by the prosecution cannot be doubted. In the case of M.D.Jadav v. State of Maharashtra reported in **1976 Cri.L.J. 1873 = AIR 1976 SC 2327** the witness had seen the actual assault on two persons but not on other two persons in a case where four murders had taken place. It was held that even assuming that the witness had not seen the appellant committing the murders of two persons there can be no doubt that the four murders were committed at about the same time as

part of the same transaction and by one and the same person owing to the similarity of the injuries which were noticed on the four bodies and the quick succession in which the four persons were murdered and the four bodies being found in the fire, disclosed the common design. In the present case Louis as well as Remi had received injuries with palkoyta as well as with sticks. Similarly two injured witnesses had also received similar injuries but they could escape by taking refuge in their farm house. The time and place of death of two deceased and the time when and the place where the two witnesses were injured being same, there can be no doubt that Louis had also received homicidal death in the same incident at the hands of these very accused.

28. What is required to prove the offence of murder under section 300 punishable under section 302 of IPC is not that the assault must be made necessarily with an intention to cause death but the same could be proved even if it is shown that the bodily injuries received by the deceased were sufficient in the ordinary course of nature to cause death by virtue of other clauses of section 300 of IPC. The said view, though is obvious from the

different clauses of section 300 of IPC, has been so interpreted and reaffirmed by the apex Court in the case of Bakhtawar v. State of Haryana reported in **1979 Cri.L.J. 883 = AIR 1979 SC 1006**.

29. In the case of Naidu Budhia v. State of Orissa reported in **1975 Cri.L.J. 564** the Division Bench of the Orissa High Court had held that even though it could not be said which accused was responsible for the fatal blow the accused must be convicted for offence under section 302 read with section 149 of IPC. In the case of Aher Pitha Vajshi v. State of Gujarat reported in **1983 Cri.L.J. 1049 = AIR 1983 SC 599** the deceased had received 20 injuries and there was no specific role attributed to any of the accused nor the fatal blow was attributed to any of the accused yet on the basis of the evidence that the accused were acting in concert and were associated with each other in initially dragging the deceased inside the Deli and also throwing him out on the road after he was assaulted inside the Deli, it was held by the apex Court that it left no room for doubt that all the accused who had participated in dragging him inside the Deli and thereafter throwing him outside the Deli after

assaulting him had shared the common intention to cause the death of the victim and, therefore, the High Court was justified in convicting all the accused for offence under section 302 read with section 34 of the Penal Code setting aside the order of acquittal recorded by the Sessions Court.

30. In the case of Lalji v. State of U.P. reported in **1989 Cri.L.J. 850 = AIR 1989 SC 754** it was held that a member of unlawful assembly cannot be acquitted for lack of corroboration as to their participation in offence committed by the assembly. It was observed in para 10 of the judgment as follows:

> "10. Thus once the Court holds that certain accused persons formed an unlawful assembly and an offence is committed by any member of that assembly in prosecution of the common object of that assembly, or such as the members or the assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence was a member of the same assembly is to be held guilty of that offence. After such a finding it would not be open to the Court to see as to who actually did the offensive act or require the prosecution to prove which of the members did which of the offensive acts. The prosecution would have no obligation to prove it."

Thus in a case of assault by members of unlawful

assembly it is not necessary for the Court to find out as to who actually gave fatal blow or require the prosecution to prove which members of the unlawful assembly committed which of the offensive acts. In other words the prosecution is not under obligation to prove which member of the unlawful assembly had given the fatal blow.

31. The trial Judge in paragraph 106 of the impugned judgment has held that though it is established that the accused gave stick blows to deceased Louis and Remi and injured PW 1 Jerome and PW 7 Hygiene and caused them simple injuries, they did so while exercising the right of private defence of person and property and, therefore, they could not be held liable for the offence of causing simple hurt by means of sticks and convict them for offence under Section 324 read with Section 149 of IPC. When the trial Judge has held accused no.4 responsible for the death of Remi and for that assault convicted accused no.4 for offence under section 304 Part II of IPC for having exceeded the right of private defence, the minimum that the trial Court should have done was to convict all the accused persons for the said offence as it was an act committed in concert and having come

running with sticks in their hands, if not with an intention to murder Louis and/or Remi, surely they had the intention to beat the two deceased and two witnesses with knowledge that in the process death may be caused. In the case of Lalji v. State of U.P. reported in **1989 Cri.L.J. 850** (Supra) it was held that the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced "from the facts and circumstances of each case". Similarly in the case of State of U.P. v. Dan Singh reported in **(1997) 3 SCC 747** it was observed that it is not necessary for the prosecution to prove which of the members of the unlawful assembly did which of the act. In Lalji's case (Supra) the Supreme Court has observed as follows:

> "While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under Section 149." (Emphasis supplied)

In the case of Masalti v. State of U.P. reported in **AIR 1965 SC 202** it was held by the Supreme Court that where a crowd of assailants were members of an unlawful assembly proceeding to commit an offence of murder in pursuance of the common object, it is often not possible for the witnesses to describe accurately the part played by each one of the assailants. It was further observed that if a large crowd of persons armed with weapons assaults the intended victims it may not be necessary that all of them have to take part in the actual assault.

32. The trial Court has held that fatal blow on Louis has not been proved because none of the witnesses have attributed assault on his head with palkoyta and the assault attributed on Louis by accused no.3 is not corroborated by the medical evidence. We have already held that in this case medical evidence does corroborate the assault on the head of the deceased with a stick which was attributed to accused no.3 who had started the assault. When the accused persons arrived on the scene with sticks in their hands as per the evidence of witnesses, accused no.3 began the assault by stick

blow on the head of Louis. Going by the hypothetical answer given by the Medical Officer stating that linear fracture of skull from frontal bone over right parietal bone of Louis "may be the result of injury no.1 which was incised wound on the right parietal region" it was held by the trial Judge that there was no injury on the head of Louis which was caused by a stick blow. It cannot be forgotten that the medical evidence is an opinion evidence. Secondly, the Court cannot go by any one of the various alternative possibilities and hold that linear fracture of skull from frontal bone was the result of injury no.1 which was incised wound conveniently ignoring the Medical Officer emphasising that it was not necessary that internal injury in the form of linear fracture of skull was result of incised wound over right parietal region. He had positively deposed that two internal injuries mentioned in column no.19 in skull and in brain were two distinct injuries and both those injuries were possible as a result of a blow by hard and blunt object. What is required to be seen for the purpose of seeking corroboration from the medical evidence is whether it is consistent with the prosecution case or not. If the injury is consistent with the ocular evidence it corroborates the

prosecution case notwithstanding the various possibilities or alternatives in which way that injury could have been possibly caused.

33. In this respect it would be desirable to refer to the decision of the Supreme Court in the case of Punjab Singh v. State of Haryana reported in **1984 Cri.L.J. 921**. It was contended in that case that the medical evidence is inconsistent with the direct testimony. That contention was turned down on two grounds. Firstly that if the direct evidence is satisfactory and reliable the same cannot be rejected on hypothetical medical evidence and secondly the medical evidence showed two alternative possibilities but not any inconsistency. In the instant case when the doctor has asserted that the internal injury which was caused was possible due to the blow on the head of Louis with hard and blunt object like stick, it being consistent with the ocular evidence does corroborate the ocular evidence and the alternative possibility contemplated half heartedly by the Medical Officer cannot be used to show inconsistency with the ocular evidence and thereby falsify the evidence of eye witnesses. In a recent case (Gangadhar Behera v. State of Orissa reported in

(2002) 8 SCC 381) it was held by the apex Court that it would be erroneous to accord undue primacy to hypothetical answers of medical witnesses to exclude the eye witnesses' account which has to be tested independently and not treated as the "variable" keeping the medical evidence as "constant". In the said case the Supreme Court has quoted from its earlier judgment in Krishna Gopal's case **[(1988) 4 SCC 302]** in which it was observed in para 24 as follows:

> "It is trite that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bantham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility."

34. It would be very pertinent and apposite to quote hear the observations of the Supreme Court in para 25 of the judgment also in the aforesaid case as regards the benefit of doubt which are to the following effect:

> "...Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."

What is further observed in para 26 of Krishna Gopal's case (Supra) is more relevant in the context of the reasoning of the trial Judge in this case, which reads as follows:

> "...Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the Judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."

Similarly in the case of Krishnan v. State reported in **(2003) 7 SCC 56** it has been held that when ocular evidence is found to be cogent, consistent and trustworthy, same cannot be discarded merely on the basis of some hypothetical answers of medical witness and minor variations with medical evidence.

35. Not holding even accused no.3 guilty of murder of Louis, who has been specifically named and attributed assault on the head of deceased Louis by

three witnesses and not holding other accused guilty by virtue of section 149 for the assault on Louis and for the assault on Remi after having proved guilt of accused no.4 is, to say the least, nothing but, to borrow words from the judgment of the Supreme Court in Krishna Gopal's case (Supra), 'uninformed legitimization of trivialities making mockery of administration of criminal justice'. In our view even if the assault on the head by accused no.3 is not proved but on the basis of the evidence of eye witnesses that all the accused had assaulted Louis with sticks as a result of which he fell down leaves us in no manner of doubt that Louis had met with homicidal death in the incident which took place between 4 to 4.30 p.m. on 11th January 1987 at the place of incident which is held by the trial Court to be hissa no.3, survey no.196 belonging to deceased Louis and his family. In the teeth of the evidence and the aforesaid law there can be no doubt that the reasoning of the trial Court holding that homicidal death of Louis is not proved at the hands of the accused persons and other accused persons cannot be held guilty for the death of Remi by virtue of Section 149 of IPC is nothing short of perverse and, therefore, not sustainable in law especially when the

death of Remi as well as Louis was held to be homicidal by the trial Court.

36. The trial Judge has believed the presence of complainant PW 1 at the place of incident in para 39 of the judgment. The trial Judge has held that the prosecution has proved the presence of injured Hygiene PW 7 at the place of incident vide para 43 of the judgment. Similarly presence of PW 6 Phelix and PW 8 Bapu Korgaonkar is also held proved vide paragraphs 50 and 53 respectively of the judgment. The presence of all these witnesses, PW 6, PW 7 and PW 8 has been mentioned in the FIR (Exh.67) lodged by PW 1. In view of the fact that the name of PW 6 Phelix has been mentioned in the FIR and his presence is also held to be proved by the trial Court, how can his presence be doubted on the ground that he had not disclosed it to the police at the time of drawing seizure panchanama of the clothes of the accused from their house, as argued on behalf of the defence. Surprisingly trial Court disbelieves his evidence. The presence of the accused has also been proved at the place of offence and is held to be so by the trial Judge. It is important to note that names of all the accused persons were mentioned in the FIR

itself. Name of accused no.8 having been referred to only as Bapu in FIR was later on clarified in the supplementary statement of the complainant in which his full name is given. There is no dispute that he is also called as ‘Bapu’. PW 11 police patil had arrived at the scene at about 9 p.m. along with police on being informed by Victor, son of Louis as per station diary entry (Exh.175) at Banda Police station that his brother Remi was murdered and his father and two brothers were lying injured at the hands of Kothawales. Police patil has deposed that he was given the names of accused nos.1 to 5 as assailants by complainant at the place of incident at about 9 p.m. when he had gone there along with the police party. On the basis of the deposition of police patil it was contended that presence of accused no.8 was not told to him. It may be that the police patil forgot the name of accused no.8 having been told to him or complainant may have missed his name but the fact remains that his name was also mentioned in the complaint which was recorded immediately after he was taken by the police along with other injured to the hospital, on the basis of which crime was registered. In view of the fact that the appeal as against accused no.8 has abated, it is

not necessary to discuss that issue. The learned Judge having held the presence of all the accused at the time of the incident proved so also the assault on the witnesses and the deceased at the time of incident, by not applying the provisions of section 149 of IPC as interpreted by various judgments of the apex Court, he has by strange reasoning convicted accused no.4 alone for offence under Section 304 Part II of IPC. The prosecution witnesses have, by their ocular evidence, corroborated by the immediate complaint lodged in the case giving the names of all the accused, and of five accused to the police patil at about 9 p.m. and in the context of several injuries received by four persons including two deceased persons proved that the persons more than five in number had gone to the scene of offence armed with thick bamboo sticks in their hands and assaulted the prosecution witnesses and the deceased. That leaves no doubt that all the accused were members of an unlawful assembly as defined under Section 141 of IPC.

37. In para 54 of the judgment the trial Court has observed that the prosecution case that incident occurred at about 4.30 p.m. in which two deceased

and two injured sustained injuries and the accused had participated in that incident gets support from the dying declaration given by Louis and Remi to different witnesses. In paragraph 61 of the judgment the trial Court has held that if the dying declarations are considered combinedly with the evidence of two injured witnesses and two other eye witnesses they support the prosecution version that the alleged incident took place at 4.30 p.m. and not 6.30 p.m. and in that incident accused and particularly accused no.4 was present and had participated in the assault. In paragraph 65 of the judgment while rejecting the defence version of a free fight between two groups at 6 p.m. as false, the trial Judge has held that the prosecution evidence has proved that the main incident in which the accused participated took place around 4 to 4.30 p.m. Similarly in paragraph 43 of the judgment the trial Court, after accepting the evidence of two injured eye witnesses, has held that the incident took place at 4.30 p.m. on the date of incident as deposed to by the prosecution witnesses who had implicated the accused persons and rejected the defence theory that there was a free fight between two groups at 6.30 p.m. In other words the trial

Court has held proved the prosecution case on the basis of the evidence of the four eye witnesses including two injured eye witnesses that incident had taken place at 4.30 p.m. in a manner as deposed to by the prosecution witnesses. All the four eye witnesses to the incident have implicated accused nos.1 to 5 for having assaulted the two injured and the two deceased i.e. Louis and Remi. Thus the trial Court has clearly negatived or rejected the defence theory that the incident had taken place at 6.30 p.m. when there was a free fight between the two sides. The said theory of free fight will be adverted to while dealing with the defence raised by the accused.

38. Though the trial Court has held that accused no.4 was responsible for amputation of legs of Remi, he has wrongly held that it was an individual act on his part and the other accused were not liable by virtue of section 149 of the Penal Code. The trial Court having held that two persons received homicidal death and two witnesses were injured in the incident as deposed to by the eye witnesses attributing the assault to accused no.4 on Remi, there is clear error

on the part of the trial Court in not holding the other accused responsible for the death of Remi by applying section 149 of IPC. In paragraph 108 of the judgment the reasoning given by the trial Court in this respect is that PW 6 Phelix had deposed that accused, other than accused no.4, who were chasing witnesses Jerome and Hygiene having gone ahead of Remi had not returned, and, therefore, the other accused cannot be held to share the common intention with accused no.4 whose assault on Remi has been medically proved to be fatal. In this respect the trial Court has ignored the evidence of PW 6 Phelix and PW 8 Bapu that both of them had also to flee from the scene. According to PW 6 he apprehended assault on him when accused no.7, mother of accused nos.3 and 4, brought to her sons' notice and the other accused that Phelix was from the community of Louis meaning thereby that he should not be spared. That was sufficient for Phelix to sense danger to his life and, therefore, he had to flee from the scene and go to his own house which was nearby. Seeing Phelix fleeing, PW 8 Bapu also felt that he may be the next target and, therefore, he also ran away. Twenty contusions on the back of Remi must have been caused due to the assault on him by other accused after he

fell down which must not have been witnessed by PWs 6 and 8 who had to flee as soon as they anticipated danger to their lives. Two injured eye witnesses Jerome and Hygiene had already taken refuge in their farm house sensing danger that they would meet the same fate as their father who had collapsed due to the merciless assault on the old man by the accused persons in the presence of three sons who could not rescue him though attempted to do so. When they tried to rescue their father they themselves were assaulted and, therefore, they had to run away for their own lives. Surely the accused persons, whose houses were on the southern side and undisputedly the farm house being on the northern portion of that hissa number, the accused who had gone towards the northern side had to return towards the southern side if they were to leave that place. Thus they must have come across Remi while returning and assaulted him with sticks again. The Supreme Court has, as quoted earlier, observed that the judicial mind has to apply its robust common sense while appreciating the evidence of the eye witnesses. Having held accused no.4 guilty for fatal assault on Remi in view of the evidence of four eye witnesses including two injured eye witnesses who attributed assault to all

the accused on Louis as well as Remi, to hold that the other accused were not liable even by virtue of Section 149 can be nothing but perverse reasoning which is inconsistent with the evidence on record and the facts and circumstances of the case. In this respect it would be relevant to refer to the evidence of complainant PW 1 Jerome who has deposed that while running away from the scene when he turned around he had seen accused nos.1 to 5 and 8 giving stick blows on Remi after he fell down on the ground. This evidence is corroborated by twenty contusions received by Remi on his back which could have been caused only when he was assaulted with sticks after having fallen down on the ground.

39. While applying section 149 of IPC, as pointed out earlier, it is not necessary for the prosecution to prove separately the injuries caused by different accused to the victim. That the accused had formed unlawful assembly can be gathered from the facts and circumstances of the case. The decisions have already been cited above to point out that common object can be culled out or reasonably be inferred from the nature of the assembly, arms it carries and behaviour at, before or after the scene of incident.

Surely when all the accused rush with sticks in their hands and start assaulting the deceased and two injured persons, all the accused knew the offences which were likely to be committed in the course of the incident even if the common object of the members of the unlawful assembly was only to beat the deceased and the prosecution witnesses, as argued on behalf of the defence. The fact that in the incident two murders had taken place, surely the accused can be deemed to know or expect that the said offences were likely to be committed in the prosecution of the common object. The unlawful assembly originally formed only to beat could lead to two murders and therefore, was well-knit with what followed as the dangerous finale of, call it, the beating as held by the supreme Court in the case of Bhajan Singh v. State of U.P. reported in **1974 Cri.L.J. 1029.**

40. The trial Court has also clearly erred in holding in paragraph 107 of the judgment that accused no.4 could not be held responsible for the offence of murder but must be imputed with the knowledge that the injuries which he caused on the legs of Remi by means of palkoyta might cause death and the original act of hitting on the legs of Remi with palkoyta was

not imminently dangerous to cause death. The trial Judge has completely misread the provisions of Section 300 of IPC under which the person is guilty of commission of murder even if the act is done with the intention of causing bodily injury to any person which is sufficient in the ordinary course of nature to cause death under clause (3) thereof. In the absence of bringing the case under any of the exceptions laid down under that section, by no other method or stretch of law, the act would attract the provisions of Section 304 of the Penal Code. It is a different thing to apply the said provision if on the basis of the evidence it is held that the accused had a right of private defence either of person or property or both and that right had been exceeded. To say that the offence of murder cannot be spelt out unless and until the hitting on the legs of Remi with palkoyta was imminently dangerous to cause death is to ignore clause thirdly of section 300 of IPC. Dr.Vanjare has clearly and unerringly deposed that two incised wounds sustained by Remi leading to amputation of bones from his right ankle and heel from his left foot were sufficient in the ordinary course of nature to cause death which led to haemorrhagical shock resulting in the death of Remi.

The learned Judge has observed that with the timely medical aid life of Remi could have been saved and cites it as one of the reasons for not holding accused no.4 guilty of offence of murder. Perusal of the medical evidence does not show that the doctor had given such opinion. No doubt in his cross-examination doctor has deposed that injury nos.3 to 7 in column no.17 of the post mortem notes are simple and they are not sufficient to cause death. On the basis of the said evidence it was argued that other accused who had assaulted Remi with sticks causing simple injuries cannot be held guilty for the offence of murder, not even for the fatal injuries inflicted by accused no.4 by application of section 149 of IPC.

41. While considering and appreciating the medical evidence with regard to the injuries on Remi one cannot be oblivious to the fact that injury at sr.no.6 consists of multiple contusions over the back of Remi which were transversely twenty in number admeasuring 12" x 2". May be that all those injuries considered separately may not have caused his death but simply because multiple injuries are simple in nature it cannot be said that they cannot be

sufficient to cause death taking their impact collectively. In any event in this case the other accused having assaulted Remi, though with sticks and causing only simple injuries, they are liable for the offence committed by accused no.4 by use of palkoyta by virtue of section 149 of IPC. Undoubtedly it was an act of all the accused committed in concert with each other and, therefore, in accordance with the judgments cited earlier, all the accused who were members of the unlawful assembly are vicariously liable for the act of accused no.4. A member of the unlawful assembly is liable even for the offence of murder committed by one of the members of unlawful assembly though he may not have participated in the assault as such. It was observed in para 9 of the judgment of the Supreme Court in the case of Lalji v. State of U.P. (Supra) which was quoted with approval in Gangadhar Behera's case (Supra), as follows:

> "While overt act and active participation may indicate common intention of the person perpetrating the crime, the mere presence in the unlawful assembly may fasten vicariously criminal liability under section 149."

42. So far as the assault by the accused in general and assault by accused no.4 with palkoyta in particular on the legs of Remi is concerned it has not only been mentioned in the FIR (Exh.67) and deposed to by all the eye witnesses to the incident but has also been corroborated by three other witnesses examined by the prosecution who had happened to visit the place of incident within a short time thereafter. The first person to go to the place of offence within short time after the incident in question is PW 9 Prabhavati @ Mangala Kesarkar. She is absolutely an independent witness. When she was proceeding towards village Bilewadi at about 4.30 p.m. she reached near "juvad" by which name hissa no.3, which was the place of incident, is known even as per the revenue record i.e. 7/12 extract (Exh.65). But the witnesses in their evidence have been calling even the place of incident i.e. hissa no.3 as "baviche galu". When PW 9 reached near the place of incident called juvad, she heard the voice in moaning pain. She saw complainant Jerome. Jerome called her near him and requested her to offer a glass of water to Hygiene who was in the farm house. Thereafter Remi, who was lying with injuries there, also called her and asked her to give him a glass of

water. That time he told her that he was assaulted by Kothavales. Similarly when she went near injured Louis he told her that he was assaulted by Kothavales of Bilewadi. Thus she has deposed about the two oral dying declarations of the dying persons attributing assault on them by accused persons who are having common surname of Kothavale. Then there is evidence of PW 10 Kamil who had gone to that place little after 7.15 p.m. When he went to see Louis the latter told him that accused no.4 Gopal and others assaulted him and his sons. That time the witness found Remi dead. Both these witnesses have been believed by the trial Court.

43. One more witness examined by the prosecution is PW 4 Inas Pareira who had been to the place of offence at about 6.30 p.m. i.e. before PW 10 Kamil had reached there. He has also deposed that when he approached Louis lying on the pathway in injured condition with injuries on his hands, legs and head, he told him that accused no.4 Kothavale and others had beaten him and his sons. He saw Remi with both his legs in fractured condition. This witness has stated in his cross-examination that PW 10 Kamil had met him while he was returning home i.e. from the

place of incident. That means both crossed each other on their way to and from the place of incident. The evidence of this witness has not been believed by the trial Court though he happened to be there at the place of incident before PW 10 had been there. In any event in view of the reliable evidence of four eye witnesses which has been accepted by the trial Court the case of the prosecution stands proved even if the evidence of these three witnesses is excluded. Of course, these witnesses had no reason to falsely give evidence on behalf of the prosecution. It is significant to point out that their statements were recorded on the following day. The evidence of these witnesses and particularly that of PW 9 Mangala to whom Remi had told that he was assaulted by Kothavales corroborates the evidence of eye witnesses that the injured as well as the deceased were assaulted by accused persons. When the reference is made to Kothavale in the oral dying declarations made by deceased to these witnesses, there can be no doubt as to which Kothavales are referred to in the said oral dying declarations. They could not be other than the accused persons all of whom bear the surname of Kothavale. It is also pertinent to point out that PW 1 complainant had not himself seen the assault by

accused no.4 with palkoyta on Remi. He has deposed that when after some time he went to see his injured father and brother Remi, Remi had told him that accused no.4 had assaulted him with palkoyta on his legs. This dying declaration finds corroboration from the complaint (Exh.67) in which it is stated by the complainant PW 1 Jerome that when he went to see injured Remi, the latter told him that he was assaulted with palkoyta by accused no.4.

44. It was argued that Exhibit 67 cannot be considered to be FIR. The trial Court has held it to be FIR and rightly so. The objection to treat Exhibit 67 i.e. the statement of Jerome recorded in the hospital at about 10 p.m. on that night as FIR, is raised because of the earlier intimation received by the police station of Banda about the incident in question which was given by Victor. The information given by Victor, son of Louis was cryptic. He himself was not an eye witness to the incident. He had arrived on the scene at about 6 p.m. after the incident was over about one and half hour before his arrival there. Seeing the dead body of Remi he goes to the farm house where he had talk with Jerome and thereafter goes to the police station Banda which is

about 14 Kms. from there and informs PW 16 Police Constable Londhe that his father Louis and three brothers were assaulted by Kothavales of Bilewadi and it was necessary to give them medical aid. He had also informed the police that his brother Remi was killed. As Victor who had seen his brother lying dead, father and other brothers seriously injured was not in mental condition to give his statement which could be recorded by the police. Otherwise also he was not an eye witness to the incident. The only thing which he saw was that his father and brothers were injured and one brother was lying dead and he was informed by complainant Jerome that it was Kothavales who had assaulted them which was told by him to the police. He had not gone there to lodge his complaint as he was unable to do so in view of the fact that he was not an eye witness to the incident but he had gone there only for seeking police help for availing medical aid to the injured persons. The police, therefore, could do nothing except to make entry in the station diary which has been produced on record at Exhibit 175 and rushed to the scene of offence along with police patil, who has been examined as P.W.11. The trial Court has given good reasons in paragraphs 27 and 29 of the judgment

for treating Exhibit 67 as FIR. In our view, even if Exhibit 67 is not considered to be an FIR it would make hardly any difference to the prosecution case. No omission or contradiction has been shown from the evidence of PW 1 Jerome whose statement is treated as FIR (Exh.67) and without reading Exhibit 67 as FIR also the prosecution has proved its case as no material omissions or contradictions have been brought on record in the evidence of any of the four eye witnesses including complainant Jerome PW 1. In view of the above the criticism levelled against the prosecution for not examining Victor is without any significance. Reference may be made in this connection to the decision of the Supreme Court in the case of Awadhi v. State of Bihar reported in **1971 Cri.L.J. 23 = AIR 1971 SC 69** in which the apex Court had considered this question observing that in such case it must be remembered that the information was not given by any one of those who had witnessed the occurrence.

45. The trial Court has also considered and held proved the assault on two injured eye witnesses PW 1 Jerome and PW 7 Hygiene as having received the injuries in the same incident. Since separate

charges are framed in respect of the assault on these two eye witnesses it is desirable to consider the injuries on these two witnesses. They were examined by PW 15 Dr.Sangle who has issued medical certificates in respect of the injuries to them which are Exhibits 159 and 160 respectively. He had examined PW 1 Jerome on 11/1/1987 i.e. the day of the incident. He found following injuries on the person of Jerome:

(1) CLW over left parietal region. Ant. aspect. 2" x 1/2" x 1/2".

(2) Swelling over right hand diffuse.

The said injuries were received within 12 hours by hard and blunt object. He was treated as in-door patient from 11/1/1987 to 18/1/1987. On examining PW 7 Hygiene on the date of incident i.e. 11/1/1987 he noticed following seven injuries on his person:

(1) CLW over Rt.Lat. As/ect of forehead 2" x 1/2" x 1/2".

(2) CLW over Lt.Parietal region 2" x 1/2".

(3) CLW over right parietal region para aspect 1-1/2" x 1/2" x 1/2".

(4) Contusion over right arm 4" x 1/2".

(5) Abrasion to right elbow, 1/2" x 1/2".

(6) Contusion over right thigh 6" x 1/2".

(7) Abrasion over right knee, 3" x 2".

He was treated as in-door patient from 11/1/1987 to 18/1/1987. As per his evidence Hygiene was brought to the hospital at about 10.30 p.m. on the same night for examination. Jerome was examined by him at about 11.15 p.m., may be because in the mean time his statement was being recorded which was treated as FIR (Exh.67). Perusal of the injuries on these two eye witnesses shows that Jerome had received contused lacerated wound on left parietal region. Similarly Hygiene had also received injuries on his head i.e. on the forehead, left parietal region as well as right parietal region. The part of the body i.e. head where these injuries were inflicted shows the intention of the accused persons to murder them. They were possible with the use of sticks. They could escape further assault by fleeing from the place and taking asylum in the farm house and save their lives. The accused have been acquitted so far as the assaults on these two injured are concerned on the ground that they had a right of private defence of person and property which was not exceeded so far

as assault on these two injured is concerned.

46. So far as the place of incident is concerned the trial Court has held that the incident had taken place in hissa no.3, survey no.196. PW 1 in para 7 of his evidence has deposed that incident took place on the land which is called juvad though locally it is called as ‘baviche galu’. PW 4 in para 11 of his evidence has referred to the place where the deceased were lying as ‘Baviche galu’. PW 6 in paragraph 4 of his evidence has referred to the place as "Baviche galu" where he had gone along with others for cutting trees and bushes. Similarly PW 7 in para 5 of his evidence has referred to the place where he along with others were clearing the trees and bushes in survey no.196 commonly known as ‘baviche galu’ while in the official record it is named as "Juvad". As stated earlier, Louis and his family as per the record of rights were owner and in occupation of hissa nos.2,, 3 and 7 out of survey no.196 which was old survey no.376. While in 7/12 extracts (Exhibits 64 and 65) hissa nos.2 and 3 are called as Juvad hissa no.7 as per Exhibit 66 is called as ‘Baviche galu’. All the witnesses had stated that at the time of incident they were removing bushes from the land

bearing hissa no.3 out of survey no.196. Even spot panchanama (Exh.88) makes a reference to the said hissa number in which farm house locally called "manger" was situated. In paras 30 and 31 of the judgment the trial Court has held that the incident had taken place in survey no.196 hissa no.3 which is having old survey number as 376. That the said hissa number is in the ownership of deceased Louis and his family is not in dispute. The map (Exhibit 144) which was drawn by DILR also shows the place of incident to be hissa no.3 of survey no.196. Though the correctness of the map (Exhibit 144) drawn by DILR office has been debated on behalf of the defence and the trial Court has also not gone by the measurements given in the said map however, the situation where the dead bodies were found as per the spot panchanama (Exhibit 88) which was drawn immediately next morning shows that the dead bodies and the blood was found in the area of the land which is survey no.196, hissa no.3 in which land also the farm house of the complainant is situated towards the northern side.

47. The trial Court has not accepted the map drawn by DILR giving exact measurements. The distance

shown in the said map has been mentioned after actually taking measurements but the same was not accepted by the trial Court on the ground that that map was drawn 15 months after the incident in question and, therefore, the exact situation or location where the dead bodies were found could not have been located. This is inspite of the fact that constable PW 16, who was present at the time of drawing of the spot panchanama and who was also waiting there during the night time of the incident guarding the dead body of Remi and place of incident, was present when the DILR officer had been to the spot for drawing the map and copy of the spot panchanama was made available to the DILR officer to know the locations where the dead bodies were found. Even the accused were present at that time. In this respect reliance was placed on behalf of the prosecution on the judgment of the Supreme Court in the case of Santa Singh v. State of Punjab reported in **1956 Cri.L.J. 930 = AIR 1956 SC 526.** In the said judgment it was held that if the draftsman is asked to prepare a sketch map of the place of occurrence, and if after ascertaining from the witnesses where exactly the assailant and the victim stood at the time of the commission of the offence and the

draftsman measures the distance between the two places and prepares the plan such plan should be relied in the Court in preference to another plan prepared by the Police Sub Inspector. In that plan the distance shown between the houses of the accused and the place of offence is about 838 feet. It means the said distance is shown after taking actual measurements. As against that the trial Court has preferred to go by the approximate distance of 400 ft. mentioned in the spot panchanama by the police. Even the witnesses have given different distances in their evidence which is mentioned in the depositions as approximate distances. Some of the witnesses have given distance of 550 ft. between the houses of the accused and the place of offence but whether the distance between the houses of the accused and the place of incident is 400 ft. or 800 ft. would make no different. It is not in dispute that from the houses of the accused the boundary of hissa nos.3 and 9 is about 50 ft. away.

48. The learned defence counsel placed reliance on the judgment of the Supreme Court in the case of Shankarlal v. State of Rajasthan reported in **2004 Cri.L.J. 2874**. In that case the Court had found

that there was unexplained delay in filing the complaint on the facts of that case. The incident had taken place at 1.30 p.m. on earlier day and the complaint was lodged at 3.15 a.m. in the night. In this case it is relevant to point out that the statement of Jerome giving all the details about the incident in question was taken without any loss of time. The incident had taken place in a remote village that also in a forest area after 4 p.m. where two persons died and two were injured. The earliest time when the police could be contacted was when Victor, son of Louis, happened to come to the place of incident at about 6 p.m. After noticing that his brother Remi was already dead and his father and two brothers were seriously injured and after learning from Jerome that the accused had assaulted them he went to Banda police station at a distance of about 14 Kms. to get the police at the scene of offence for removing the injured to the hospital. He could reach there at about 7.30 p.m. and thereafter the police was informed. After the entry was made in the station diary and by the time police came at the scene it was 9 p.m. Thereafter the police took the injured to Sawantwadi cottage hospital. In Sawantwadi cottage hospital Louis was declared dead

and after recording the lengthy statement of Jerome the offence was registered at about 11.45 p.m. Thus the prompt lodging of FIR giving all the details about the incident in question rules out the possibility of deliberation to falsely implicate any person in the crime as held by the Supreme Court in the case of Krishnan v. State reported in **(2003) 7 SCC 56**. Reference may also be made to the decision of the Supreme Court in the case of Kanhiyalal v. State of Rajasthan reported in **AIR 1989 SC 1515**. In that case members of the complainant's party accompanying victims in bullock cart took them to the hospital where Medical Officer was not available. Thereafter they were taken to other hospital by bus after returning to the village in a bullock cart. Thereafter complaint was lodged with the police and it was held that the delay was properly explained. The prosecution has also led the evidence to show that after the arrest of the accused on the following morning i.e. on 12th January 1987 blood stained clothes from the house of the accused were seized under panchanama (Exh.89). Under the said panchanama clothes of accused nos.2, 3 and 4 were seized which were found blood stained but as per the CA report (Exh.193) dated 31st July 1987 the human blood was

detected on the clothes of accused no.2 only.

49. The prosecution has also proved the discovery of weapons of one palkoyta and five bamboo sticks at the instance of the accused. That recovery was made on 13th January 1987. There was recovery of sticks at the instance of accused nos.1 to 5 and in addition there was recovery of palkoyta at the instance of accused no.4 which was blood stained. All these articles, palkoyata - article A and sticks - articles B to F, were found to have human blood as per the CA report dated 31st July 1987 (Exh.193). These circumstances have not been discussed by the trial Court as on the basis of the ocular testimony of the witnesses and the medical evidence corroborated by the immediate FIR lodged by PW 1 the trial Court had held accused no.4 guilty of the assault. Even the trial Court has held that the incident had taken place at the time and place as per the prosecution case but others were acquitted on the ground that there is no evidence against any of the other accused persons for causing fatal blow and they cannot be held vicariously liable for the assault made by accused no.4 with palkoyta on the legs of Remi.

50. On behalf of the defence it was argued that eye witnesses' evidence should not be believed as their conduct is quite unnatural because when the father was being assaulted, the sons started running away instead of protecting their father. In support of the said argument an unreported judgment of the Supreme Court in the case of Maruti Rama Naik v. State of Maharashtra in Criminal Appeal No.626 of 2002 decided on 9th September 2003 was relied. The judgment cited by the defence counsel is, in our view, not applicable to the facts of this case. That was a case where the witness had not told the police when his statement was recorded that two accused had attacked deceased Krishna Naik and later on claimed to have seen the said attack by those two accused also. In the present case that is not the situation. The eye witnesses' statements were recorded. The statement of Jerome was recorded the same night immediately after he was taken to the hospital by the police. It was necessary to remove him first to the hospital along with dying Louis than to wait at the place of incident to record his statement. Police had reached there at about 9 p.m. and thereafter had to take the injured to the hospital at a distance of about 12 kms. After going to the hospital they

recorded his statement after 10 p.m. It is not that in this case the sons did not try to rescue their father. As per the prosecution case initially assault was made on Louis, the father of the complainant. All the three sons present there rushed to rescue him. When they went to rescue their father Louis all the three sons were assaulted by the accused and the witnesses have deposed that apprehending that they would also be killed they ran away and took refuge in their farm house. While two sons could escape by going to their farm house, Remi fell down and then he was mercilessly beaten and his two legs were chopped off. Certainly we do not expect the sons to remain there and fight the accused till they bleed to the last drop of their blood. It depends on person to person whether one would like to risk his own life by remaining there to defend their father or seeing that the father has already fallen down because of the assault on him they should remain there to meet the same fate. There is no set rule of natural reaction and, therefore, the evidence of the witnesses cannot be discarded on the ground that their reaction was unnatural. In fact we find nothing unnatural in the conduct of the sons who had initially gone to rescue their father but were

helpless. In this connection it would be relevant to refer to the judgment of the Supreme Court in the case of Rana Pratap v. State of Haryana reported in **AIR 1983 SC 680** wherein it has been held that every eye witness to the murder reacts in his own way. There is no set rule of natural reaction and to discard the evidence of witness on that ground is unrealistic and unimaginative.

51. Much ado was made on behalf of the defence about the injuries received by the accused and non-explanation of the said injuries by the prosecution. It is well settled that no duty is cast on the prosecution to explain minor injuries found on the person of the accused. Such injuries in fact assure the Court about the presence of the accused at the time and place of incident. It would be relevant at this juncture to refer to the injuries received by the accused. They were examined by Dr.Vanjare PW 14. While accused no.3 and his wife accused no.6 were examined by the doctor on 11/1/1987 itself at 7 p.m. pursuant to the complaint (Exh.174) lodged by them at Banda police station, accused nos.1, 2 and 4 were examined after their arrest on 12/1/1987. As per the Medical Officer accused no.1 had no injuries. Yet he

complained about the pain over the right arm. Accused no.2 had one abrasion over left knee joint 1/2 cm. x 1/2 cm. and swelling over right hand. Accused no.3 had incised wound over left scapular region 2" x 1/2" x 1/2" and small abrasion over neck 1/1 cm. x 1/2 cm. Accused no.4 had tenderness over left knee joint and small abrasion over left tibia just below knee joint. Accused no.6 Sunita had small abrasion over front of head right side. It is important to note that except one incised wound over the back of accused no.3, the injuries on other accused persons are not even worth noticing or considering which are in the nature of abrasion, swelling and tenderness. When accused no.1 did not have even an abrasion he had complained of pain over the right arm. Though accused had received only minor injuries so much ado had been made by the defence counsel and it was argued that the prosecution has not explained those injuries and that accused had to resort to right of self defence of person. Even the incised wound on the back of accused no.3 is also very minor injury. The Medical Officer has deposed that all the injuries which were received by the accused were simple and superficial.

52. The decisions of the Supreme Court galore on the point that the prosecution is not liable to explain the minor injuries on the persons of the accused. Reference may be made to the judgment of the Supreme Court in the case of Jagdish v. State of Rajasthan reported in **1979 Cri.L.J. 888 = AIR 1979 SC 1010**. In that case it was held by the Supreme Court that obligation on the prosecution to explain injuries on the accused is cast when the injuries on the person of the accused are very serious and severe and not superficial and it must be shown that those injuries had been caused at the time of occurrence in question. Despite the fact that the aforesaid judgment of the Supreme Court was cited before the trial Court, the trial Court has surprisingly cast obligation on the prosecution to explain the injuries on the person of the accused in paragraphs 96 to 99 of the judgment by observing that though four prosecution witnesses were questioned regarding the injuries sustained by accused none of them offered any explanation regarding injuries. The trial Court has wrongly relied on the judgment of the Supreme Court in the case of State of Gujrat v. Bai Fatama reported in **AIR 1975 SC 1478** which is not applicable to the present case. The reference to other

decisions in the case of Salim Zia v. State of U.P. reported in **1979 Cri.L.J. 323** as well as Yogendra Morarji v. State of Gujarat reported in **AIR 1989 SC 660** is also irrelevant and out of context. Reference may be made to the recent judgment of the Supreme Court in the case of Laxman Singh v. Poonam Singh reported in **(2004) 10 SCC 94** in which the Supreme Court has reaffirmed the principle that the obligation is not cast on the prosecution when the injuries suffered by the accused are minor and superficial and the evidence is so clear and cogent, consistent and trustworthy that it outweighs the effect of omission on the part of the prosecution to explain the injuries.

53. As observed earlier all the injuries of the accused except one minor incised injury on the accused no.3 are tenderness, swelling and abrasion which are stated by the doctor to be superficial. One would wonder whether those injuries were caused in that incident or were self inflicted for the purpose of lodging complaint at the police station. The injury of accused no.3 which is incised wound on back also seems to have been self-inflicted because he had to go to lodge complaint at the police

station. When he had lodged the complaint at the police station he should have produced his shirt to show that there was cut on his shirt on the back side without which he could not have got incised wound on his back if he had been injured at the time of incident because of the assault on him by PW 7 as alleged in the complaint (Exh.174) lodged at Banda police station same evening. While in the complaint (Exh.174) accused no.3 had complained that he was assaulted by PW 7 Hygiene on his back, in cross-examination the case put on behalf of the accused is that PW 1 Jerome and PW 7 Hygiene had beaten accused on.3 on his back with palkoyta when there is only one minor incised wound on his back. At the highest it is possible that when accused no.3, to begin with, started assaulting Louis on his head with stick and the sons rushed to rescue their father, one of them might have injured him to defend their father. On behalf of the complainant reliance was placed on the judgment of the Division Bench of this Court in the case of Laxman v. State of Maharashtra reported in **1984 (1) Bom.C.R. 458** in which learned defence counsel Mr.Chitnis himself had appeared on behalf of the accused. Rejecting the argument of the learned counsel the Division Bench of

this Court had held that when the incident took place in the premises of the victims, the members of the family of the victim had a right of private defence and, therefore, the accused were not entitled to raise the plea that the injuries on the person of the accused were unexplained.

54. So far as the motive is concerned the prosecution has produced on record the documentary evidence to show that there was enmity between two sides especially between Louis and the accused persons on the ground of right of way which was passing through the portion of the land belonging to deceased Louis. The accused persons are residents of Bilewadi, a small village which is on the southern side of survey no.196. There was a pathway to go to village Uthawane from Bilewadi through survey nos.371 and 372 belonging to deceased Louis. That pathway was closed because in the year 1985 Louis had planted mango graft trees in those survey numbers and, therefore, had to put a compound wall around those survey numbers. Because of that compound wall put up by deceased Louis the accused persons had lodged complaints against him at the police station and, therefore, the police had initiated chapter

proceedings as well as 145 proceedings between the parties which were pending that time. As stated earlier the accused had also filed civil suit in the Court of Civil Judge Junior Division at Sawantwadi but could not get even ex-parte ad-interim injunction order as the accused had no documentary evidence to show their right in the property. That suit was in respect of survey nos.371 and 372. Copy of the plaint has been produced on record at Exhibit 76 while copy of the 145 proceeding is produced on record at Exhibit 78. The accused have also produced on record the complaint dated 30th July 1985 addressed to the Tahsildar about their alleged right of way passing through survey nos.371 and 372. Copy of the complaint in the Civil Suit filed by some persons including some of the accused persons is produced on record at Exhibit 58. Copy of the order dated 22/4/1986 passed by the Jt.Civil Judge Senior Division declining to issue ad-interim injunction order on the ground that no specific document was produced to show prima facie easementary right is part of Exhibit 59 along with the application for interim injunction. Thus the prosecution has proved the motive which motivated the accused to commit the crime in question. The present incident seems to

have occurred on account of the accused apprehending closure of pathway which passes through hissa no.3 of survey no.196 belonging to deceased Louis which goes from Bilewadi to Uthawane when deceased applied for survey of his land in survey no.196.

55. It is relevant to note that in the forenoon of 11/1/1987 police patil PW 11 had served notice issued by the DILR office to some of the villagers of Bilewadi that the measurements would be taken of hissa nos.2, 3 and 7 of survey no.196 on 16th and 17th January 1987. PW 11 Police Patil Krishna Sawant in his deposition has stated that on 11/1/1987 at about 9 a.m. he had gone to Bilewadi for effecting service of notice and he had told accused no.3 and some other persons from that village like Tukaram Shinde, Arjun Sawant and Ajgaonkar by reading out the contents of the notice that the measurements would be taken on the date mentioned in that notice and thereafter he went to the farmhouse of deceased Louis as he was called by the latter to remain present when private surveyor PW 12 would be showing the area of his land from where the bushes were required to be removed for the purpose of facilitating taking of measurements by the official surveyor on 16th and

17th January 1987. After serving the notice on the villagers police patil had gone to the place of incident at the request of Louis where surveyor PW 12 was also present. After the surveyor had shown the places from where the bushes were required to be removed, they had lunch in the farmhouse and thereafter surveyor as well as the police patil left.

56. The complainants had started clearing of the bushes at 3 p.m. The accused did not go to the place of incident in the morning when the private surveyor PW 12 and police patil PW 11 were present. They went there in the afternoon after PW 11 and PW 12 had left that place and started assaulting Louis and his sons at about 4 p.m. that afternoon. In the complaint lodged by accused no.3 that evening after the incident which is produced at Exhibit 174, the accused no.3 has mentioned that while he and his wife accused no.6 were going towards village Uthawane through that pathway passing through the land of Louis, they were obstructed, abused and threatened and PW 7, named as accused no.1 in his complaint, had assaulted on his wife's head and on his back with palkoyta. That complaint was lodged at 6.15 p.m. on the date of the incident i.e. after the incident in

question took place between 4 and 4.30 p.m. Contents of the said complaint go to show that the accused must be having objection about the measurements being taken by Louis in his land fearing that after taking survey of his land he might put fencing. One would fail to understand as to why the complainants would start assaulting accused no.3 and his wife also when they were simply and quietly passing through the pathway to go to Uthawane from Bilewadi. One would also fail to understand why PW 7 would assault with a palkoyta on the head of a lady, accused no.6 who is the wife of accused no.3. On the said complaint both were examined in the same evening by the Medical Officer and what was found on the head of accused no.6 was only a small abrasion which must be self inflicted.

57. The argument that no independent witness from Bilewadi was examined has no substance. The accused were from Bilewadi. The witnesses from Bilewadi would not have come forward to give evidence against the accused. The prosecution however examined independent witnesses like PW 9 Mangala and others. People from Bilewadi were not expected to give evidence against the accused. Moreover there was no

other independent eye witness to the incident who could have been examined. PW 6 Phelix and PW 8 Bapu Korgaonkar were not related to the complainant's family. There were no other independent eye witnesses from the locality who have been omitted from being examined by the prosecution. In any event in a murder case of this type the relations, particularly injured eye witnesses, are not expected to falsely implicate accused persons leaving the real culprits. Reference may be made to the judgment of the Supreme Court in the case of Gangadhar Behera v. State of Orissa reported in **(2002) 8 SCC 381**.

58. It would be relevant at this stage to consider the defence raised by the accused. The defence raised by the accused has varied from time to time. In the cross-examination of PW 7 it was put to him that he had assaulted accused nos.3 and 6 with palkoyta which is denied by the witness. What is more important is that suggestion put to the witness is that incident of assault on accused nos.3 and 6 had taken place at 5.30 p.m. as against that in the complaint (Exhibit 174) lodged by accused no.3 while he was in the company of his wife-accused no.6, it is

alleged that the incident of assault on him and his wife had taken place at 4.15 p.m. on 11/1/1987 and the police had registered the crime for offence under Sections 324, 504, 506 read with Section 34 against PW 7, deceased Louis, deceased Remi and complainant Jerome. The defence had gone even to the extent of suggesting to the witnesses that deceased Louis and deceased Remi were having guns in their hands. Referring to those suggestions the defence counsel had argued how the accused who were only eight in number including two ladies could have assaulted them when they were armed with guns, little realising that in that case Louis and his sons would not have been assaulted and there would have been casualty on the side of the accused. The second line of defence adopted by the accused while cross-examining accused no.7 is that after assaulting accused nos.3 and 6 the complainants went towards the south of hissa no.3 to dispossess the accused persons and started cutting trees from hissa nos.9 and 10. Therefore, some persons from Bilewadi, other than the accused, enquired from the complainants why they had started cutting the trees in hissa nos.9 and 10 and when the complainants started rushing towards those persons and pelting stones at them the residents of Bilewadi

arrived on the spot between 6.30 and 6.45 p.m. in hissa nos.9 and 10 and thereafter there was fight in which the complainants must have been injured. On behalf of the accused written says have been filed in which also the defence taken is on the same lines.

59. On behalf of the accused one defence witness DW 1 Tukaram Shinde has been examined. According to this witness he was in his house on the day of the incident. When he heard the shouts coming from the side of the house of accused no.3, he went there. He noticed injuries on accused nos.3 and 6 and he asked accused no.4 to take them to Banda. Accused nos.4 and 8 returned at Bilewadi at 9.30 p.m. In the mean time at about 6 p.m. deceased Louis and his sons started cutting trees. At that time 50 to 60 persons from Bilewadi went there and there was a free fight. In examination-in-chief itself he states that he did not see the incident of the fight but he heard the shouts of free fight while he was at his house. He had seen Louis and Remi lying on the ground dead. He had claimed rights in hissa no.3 of old survey no.376 i.e. new survey no.196 but had no documentary evidence to show any rights in the said land. Perusal of his evidence shows that he was put up on

behalf of the accused in support of their defence that the incident had taken place at about 6.30 p.m. when group of 50 to 60 persons had assaulted the complainants and the deceased because of the cutting of trees from hissa nos.9 and 10 of survey no.196 which hissa numbers belong to other villagers. The perusal of the deposition of the defence witness leaves no doubt that he is palpably, obviously and apparently a false witness put up by the defence.

60. It cannot be disputed that the burden is on the prosecution to prove the case against the accused and the accused is not bound to open his mouth in defence but adverse inference can be drawn against him in case he is not able to explain things put to him in his 313 examination and if the accused says something in defence his say cannot be ignored or excluded from consideration against him. In many decisions of the apex court false defence raised by the accused has been considered legally to be an additional circumstance that can be used against the accused.

61. It is important to note that the accused had been varying their defence as it suited them and in the process conflicting and inconsistent defence was put up at different stages. In the bail application made on behalf of the accused before the Sessions Court it is stated that accused no.2 had assaulted deceased Louis on his head with palkoyta after taking it from the hand of Louis in self-defence. That bail application is produced on record at Exhibit 215. In para 12 of the said application it was stated that deceased Louis abused accused nos.6 and 7 in filthy language and attacked them with sharp edged weapon and thereafter accused no.2 in exercise of right of private defence under Sections 96 and 97 gave blow to the deceased Louis which is stated by the doctor to be possible with use of palkoyta. After considering the judgment cited in that behalf and considering the provisions of Law of Evidence the trial Court in paragraph 81 of the judgment has discarded that aspect on the flimsy ground that the statement containing admission cannot be accepted unless the party agrees to accept it in entirety.

62. Not a single document has been produced on behalf of the accused to show that they had any right

in respect of the land from where the bushes were cut. The defence that the incident took place at 6.30 p.m. when a group of fifty to sixty villagers of Bilewadi went and assaulted the complainants because of the cutting of trees in hissa nos.9 and 10 is firstly inconsistent with the complaint lodged by accused no.3 which is produced at Exhibit 174 in which there is no mention about the same. In that complaint it is alleged that when accused nos.3 and 6 were passing through the pathway in the land of deceased Louis they were obstructed and assaulted by PW 7. In order to reconcile the said complaint with other defence DW 1 has been examined who speaks both about the alleged assault on accused nos.3 and 6 initially and also about the second incident having allegedly taken place after they left to go to Banda police station. Thus the defence raised on behalf of the accused is obviously false. Apart from raising the belated defence that the incident of assault on complainants had taken place when a mob of 50 to 60 persons from village Bilewadi had come on the scene which is inconsistent with the complaint lodged by accused no.3, no trees cut from hissa nos.9 and 10 of survey no.196 had been brought to the notice of Investigating Officer at any point of time. Nor any

complaint has been filed by any of the villagers including accused persons and the defence witness against the family of Louis for having encroached upon their land and removing the trees from their land. No doubt it is not necessary for the accused to specifically raise defence of exercise of right of private defence either of person or property but if from the facts and circumstances of the case the Court finds that the accused had assaulted the complainants in exercise of right of private defence the Court has to consider the same. However, whenever the plea of private defence is raised on behalf of the accused as in this case the burden to prove the same is on the accused though the standard of proof required to prove the right of private defence is not same as on the prosecution to prove the guilt of the accused. It is well settled law that so far as the accused are concerned the defence plea can be established by preponderance of probability as held in a recent decision of the Supreme Court in the case of Laxman Singh v. Poonam Singh reported in **(2004) 10 SCC 94**.

63. In this case undoubtedly the prosecution through the evidence of four eye witnesses including two injured eye witnesses has proved how the incident

in question took place. Four persons were assaulted by a group of six male accused holding bamboo sticks in their hands. In the initial assault made on Louis he fell down. When the sons went to rescue him they were also assaulted and, therefore, they had to run away from the place of incident. The evidence of those four witnesses is absolutely credible which is corroborated not only by the medical evidence but also by the immediate complaint lodged same night giving all the details. Even police patil PW 11 has corroborated the complainant. When he along with police went to the scene of offence about 9 p.m. that time the complainant named accused nos.1 to 5 who had assaulted the injured. Neither from the evidence or any circumstance on record the right of private defence of person can be spelt out. There is no specific plea raised by any of the accused in their written say or Section 313 examination that they had assaulted the four injured persons including two deceased in exercise of right of private defence of person or property. As per the defence of accused nos.3 and 6 after being assaulted by PW 7 they meekly went away and lodged the complaint at Banda police station. From the evidence on record there can be no doubt that the accused were aggressors and though the

complainants were having palkoytas in their hands they did not make use of them. Three sons initially went to rescue their father when he was assaulted by the accused persons and ran away from the place as soon as they were also assaulted by the accused persons. If at all accused no.3 was injured by PW 7 as is the defence case, that must be by way of defence of person of Louis because it was accused no.3 who initially assaulted Louis on his head with stick. When three sons rushed to rescue him they were assaulted by all the accused. When three sons went to rescue Louis it is quite possible that PW 7 might have used palkoyta on the back of accused no.3. If that is so it would be only in exercise of right of private defence of person of Louis which PW 7 was entitled to exercise.

64. Reference may be made in this connection to the decision of the Supreme Court in the case of Kishan v. The State of Madhya Pradesh reported in **1974 Cri.L.J. 324 = AIR 1974 SC 244**. In that case the accused had gone unarmed to the house of the deceased with the intention of causing physical harm to him. The deceased was pulled out of his house by subjecting him to punching and kicking. The deceased

escaped from their grip and caught hold of a weapon called ‘khutai’ and struck three blows on the head of one of the accused. One of the accused thereafter snatched the weapon from the hands of the deceased and gave blows on his head causing fracture of skull which resulted in his death. It was held that the accused were aggressors as the deceased was acting in exercise of right of private defence when he assaulted with weapon one of the accused persons on his head before he was given fatal blows by the other accused. Reference may also be made to the decision of the Supreme Court in the case of Kanhiyalal v. State of Rajasthan reported in **AIR 1989 SC 1515**. In that case injuries received by accused were of simple nature as against those suffered by the deceased persons. It was held that the accused were aggressors and were not entitled to right of private defence as they were not permitting the witness to take the victim to hospital. In the case of Dular Mahto v. State of Bihar reported in **AIR 1993 SC 927** the accused persons had attacked the victim. Some of the accused had sustained injuries during the same occurrence. The contention raised on behalf of the accused that the accused were injured at the hands of the deceased and his men and, therefore, they were

entitled for acquittal on the plea of self-defence was rejected as the presence of accused at the scene of offence and their participation in the occurrence was established and it was the accused who had gone to the place of offence and started attacking deceased along with others and if in the course of that occurrence accused sustained simple injuries they are not entitled to plead the right of self-defence of person. In the case of Shivalingappa Kallayanappa v. State of Karnataka reported in **AIR 1995 SC 254** the deceased had erected a hut and was raising crop on a part of the plot which was the cause of dispute. The erection of hut and raising of crop indicated possession of the deceased on that portion of land. The defence version that the deceased and the prosecution witnesses had come and attacked accused was not believed since the deceased was in possession of the land and it was held that the defence did not have the right of self-defence.

65. Now as regards the right of private defence of property it is relevant to point out that the ownership in respect of hissa no.3 of survey no.196 of Louis and his possession thereof is not disputed. None of the accused have produced any documentary

evidence to show that the land on which the incident took place was in their occupation nor they have been able to show that trees or bushes were cut by deceased Louis and his sons and employees from the land belonging to them. The prosecution has produced on record 7/12 extracts which are authentic documents showing the ownership of the land of Louis and his family in respect of hissa nos.2, 3 and 7 of survey no.196. Exhibit 64 is 7/12 extract showing the possession of Louis and his family in respect of hissa nos.1 and 2 of survey no.196. Exhibit 65 shows ownership of Louis and his family of hissa no.3 of survey no.196. Similarly Exhibit 66 shows the ownership of Louis and his family in respect of hissa no.7 of survey no.196. At the time of incident the bushes were being cut from the land bearing hissa no.3 of survey no.196 belonging to the deceased Louis. He had adopted a lawful course by approaching the DILR for the measurement of his lands. Initially he had applied for survey of land in the year 1986 pursuant to which DILR authorities had gone to the land on 28th May 1986. On that day survey was not taken because the measurements could not be taken owing to the existence of bushes on those lands. Accordingly statement was recorded by the DILR

authorities on the same date of deceased Louis. Thereafter another application was made by Louis towards the end of 1986 for taking survey of his land. The notice dated 1/1/1987 was issued regarding taking of the measurements which is produced on record at Exhibit 62 in which noting is made that the measurements would not be taken if the bushes existed on the land on the date of taking measurements. In order to ensure that the bushes are not removed from the land of others Louis engaged the services of PW 12, a retired officer from the office of DILR on 11/1/1987 to show him the bushes which were required to be removed for the purpose of facilitating taking of measurements on 16th and 17th January 1987. Out of precaution he had also invited the Police Patil on that occasion. The accused persons learnt about the same when police patil PW 11 had gone to Bilewadi to serve the notices on the villagers about the survey of land of Louis which was to take place on 16th and 17th January 1987. PW 11 has deposed that he had read out the notice to the villagers including accused no.3 whose name does not appear in the notice, in the forenoon of 11/1/1987. The taking of measurement by Louis of his lands seems to have annoyed the accused persons apprehending that he

might put up the fencing and close the pathway as was done in other survey numbers in the year 1985. Their complaints in this regard were already pending in chapter proceedings as well as 145 proceedings adopted by the police on the complaints of the accused. Even the suit filed by the accused was also pending in the Court of Civil Judge. When the above proceedings were pending Louis would not dare to take any precipitate action. He had wanted to do everything legally. It was the accused who wanted to take law in their hands and therefore, rushed to the land of Louis and started assaulting Louis and his sons. No documentary evidence has been shown that even the adjoining hissa numbers of survey no.196 belong to the family of the accused persons. The reliance is only placed on "Akarphod patrak" (Exh.81) which was issued in the year 1958. It is pertinent to note that in that document name of Ganesh Rama Sawant is shown as tenant in respect of hissa no.3 and the owner’s name is shown to be that of Anton Fernandez, uncle of deceased Louis. On the other hand the prosecution has produced latest "Akarphod patrak" (Exh.232) which was issued on 26/12/1981. In that document name of Louis is shown along with name of Anton Fernandez in the ownership column in respect

of the said hissa no.3. It cannot be disputed that so far as the rights vis-a-vis land are concerned 7/12 extracts are the authentic documents showing the rights in respect of the land whether with regard to ownership or tenancy. In that respect section 159 of the Maharashtra Land Revenue Code, 1966 can be referred to which reads as follows:

> **159. Record of rights at commencement of Code:-** Until the record of rights of any area in the State is prepared in accordance with the provisions of the Chapter, the existing record of rights in force in that area under any law for the time being in force (including the record of rights prepared under section 115 of the Madhya Pradesh Land Revenue Code, 1954), shall be deemed to be the record of rights prepared under this Chapter.

Reference may also be made to the decision of the Division Bench of the Bombay High Court in the case of Jaiprakash Agarwal v. Smt. Lilabai Bhate reported in **AIR 1963 SC 100** in which it is held that entries in the record of rights can be presumed to be correct until the contrary is shown.

66. Accused on the other hand have neither proved by documentary evidence any right in respect of hissa no.3 of survey no.196, the place where the incident took place nor have they produced documentary evidence to show that they had any right of ownership in respect of hissa nos.9 and 10. The accused have not even shown that the bushes from the land other than hissa no.3 were cut on the day of incident which gave them cause even to attack the complainants. The document relied on by them is of the year 1958. The name of one Laxman Bhikaji Kothawale is shown in respect of hissa no.9 in the Akarphod patrak which was issued in the year 1958 but no document has been produced to show after coming into force of Maharashtra Land Revenue Code, 1966. The defence that the trees were cut from the adjoining land is certainly an after thought in respect of which also no evidence is produced. The defence witness examined on behalf of the accused has claimed that 30 trees from his land were cut but still he had not chosen to lodge any complaint in respect thereof nor cut off trees were shown to the Investigating Officer though he claims to have gone to the place of offence even at the time when police had gone there at 9 p.m.

on the same night as well as next day at the time of drawing spot panchanama. In any event strangely enough DW 1 claims right in respect of hissa no.3 which undoubtedly as per the documentary evidence belongs to deceased Louis and his family. That leaves us in no doubt that defence raised by the accused is absolutely false and if really they had a grievance about the cutting of the trees from their land accused no.3 would not have omitted to mention it in his complaint (Exh.174) lodged same evening. Thus the above defence seems to have been developed because the prosecution witnesses had deposed that the two ladies i.e. accused nos.6 and 7 who had gone to the place of incident in hissa no.3 had questioned Louis and his sons as to why they were cutting trees from their land. But in the complaint (Exh.174) they have not mentioned so about the same. This means the ladies were sent ahead to question the accused by way of pretext to attack the complainants. It is pertinent to note that the accused immediately followed two ladies. They were armed with sticks and immediately started assaulting Louis and others.

67. In this connection reference may be made to the decision of the Supreme Court in the case of

Munney Khan v. State of M.P. reported in **AIR 1971 SC 1491** wherein it was held that there is no right of private defence in cases where there is time to have recourse to the protection of public authorities. The right of private defence is essentially a defensive right circumscribed by the statute and it cannot be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose as done in this case. In this connection reference may also be made to the decision of the Supreme Court in the case of Ansaram Yelve v. State of Maharashtra reported in **1996 Cri.L.J. 1718 = AIR 1996 SC 2945**. In the said case it was found that the deceased were the owners and in possession of the land and the accused and no right, title, interest or possession therein and, therefore, it was held that the accused were not entitled to a right of private defence of property. In the present case also the accused have not shown their right in respect of hissa no.3 nor there is anything on record showing their right nor evidence is led on behalf of the accused to demonstrate or prove that trees were cut or felled from their land.

68. Referring to the spot panchanama wherein the

dead bodies were shown to be on the side of the pathway it was argued vehemently on behalf of the accused that it means that trees on the side of the pathway were being cut and, therefore, there was encroachment or trespass on the land of the accused without realising that that pathway is passing from the land of deceased Louis only. It is a small pathway and on both sides of that pathway is the land bearing hissa no.3 of survey no.196 belonging to the family of the complainant.

69. The trial Court while dealing with the question of right of private defence of property in paragraph 95 of the judgment has wrongly relied on Exhibit 81 - Akarphod patrak of the year 1958 produced on behalf of the accused in which name of one Ganesh Rama Sawant has been shown as tenant in respect of hissa no.3. That document is outdated. On the other hand the prosecution has produced later document, again Akarphod patrak of the year 1981, in which the name of that Sawant does not appear but the name of deceased Louis has been shown along with his uncle Anton Bastya Fernandez. It is pertinent to note that though the prosecution had produced Akarphod patrak issued in the year 1981 which is

Exhibit 232 the same has not been referred to by the trial Judge anywhere in the judgment. Thus the finding based on wrong premise is bound to be erroneous. Secondly the trial Court has referred to the notice in respect of survey to be undertaken of the land of deceased Louis in which names of some Kothawales appear but that is far from proving that the complainant had removed the bushes from any of the lands not belonging to Louis. If the trees had been cut from the adjacent land the accused would not have kept quiet and made a mention about it in the complaint which was lodged by accused no.3 or some villagers would have lodged the complaint and shown the cut off trees to the Investigating Officer. It is not the case of the accused that the trees which were cut from the adjoining land were removed by any of the persons from the complainant's side when four persons were injured two of whom died and the others had to run away from that place. The trial Court has also referred to the partition deed (Exh.125) which was produced by the prosecution showing partition of land in the family of deceased Louis Fernandez. The trial Judge has again wrongly observed that land bearing survey no.196, old survey no.376 was not included in that partition deed and has gone to the

extent of drawing inference that family of Louis Fernandez was not in possession of the said land inspite of the authentic documentary evidence produced by the prosecution in the form of 7/12 extract. Perusal of the partition deed (Exh.125) shows that hissa no.2 has been included therein so also hissa no.3. Wrongly stating in the judgment that the Akarphod patrak issued in the year 1958 was produced by the deceased though it was produced by the accused, the trial Judge wrongly comes to the conclusion that the accused are in possession of the adjacent land. The said Akarphod patrak, as stated earlier, was produced not by the prosecution but by the accused themselves. The trial Judge surprisingly does not refer to the Akarphod Patrak Exh.232 issued on 26/12/1981 which was produced by the complainant showing the name of the deceased Louis as the owner of Hissa No.3. Merely because names of some Kothwales appear in the notice, the right of private defence to property cannot be said to have arisen when no evidence is produced nor any complaint was lodged by or on behalf of the accused that any trees from the adjoining land were cut by the complainant's party. The trial Court has also wrongly observed in paragraph 96 of the judgment that evidence of the

prosecution witnesses or the complaint mentions that Louis group had cut trees in the adjacent land possessed by the accused. We have, therefore, no doubt that the accused had not assaulted the complainant's party in exercise of right of private defence of property.

70. The accused were undoubtedly aggressors who had assaulted the complainant's party out of vindictiveness because of the previous incidents when deceased Louis had put up fencing around his land bearing survey nos.371 and 372 consequent upon which chapter proceedings and 145 proceedings were initiated by the police on the complaint of the accused and the civil suit filed by the accused was pending. In fact the complainant's party had a right of private defence of their person but they had not exercised that and had meekly tried to escape by running away from the scene after initial attempt to rescue their father from the assault on him by the accused. PW 1 - complainant has stated in his evidence that when three brothers went to rescue their father Louis all the accused started assaulting them and, therefore, fearing for their lives they dropped the palkoytas from their hands at that place

and started running away towards their farmhouse. Even two servants who were witnessing the incident initially had to run away fearing for their lives after accused no.7 pointed out to the other accused that PW 6 also belonged to the community of the complainants which was an indication that the accused would have assaulted him also.

71. In view of the aforesaid evidence we have no doubt that the trial Court has clearly erred in acquitting the accused of the offences with which they were charged. The trial Court has also clearly erred in holding that the accused had a right of private defence of person and property and it was only accused no.4 who had exceeded that right and others were within their rights to assault the complainant's party in exercise of right of self-defence. The trial Court has clearly erred in holding that the other accused were not vicariously liable for the murder of Remi and none of the accused was liable for the murder of Louis. The reasoning of the trial Court is undoubtedly perverse and against the evidence on record. In this connection it would be appropriate to refer to the observations of the Supreme Court holding that in order to give benefit

of doubt to the accused there must be reasonable doubt and acquittal on the basis of imaginary doubt should not be allowed. In the case of Shivaji Bobade v. State of Maharashtra reported in **(1973) 2 SCC 793** it was observed by the Supreme Court in para 6 as follows:

> ..."The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt, which runs thro' the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. ... ... a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent."

72. In our view this is a case where miscarriage of justice has arisen due to the wrong acquittal of the guilty. In this case despite voluminous evidence against the accused they have escaped conviction and consequent punishment because of their unmerited acquittal. Such unmerited acquittals which "tend to lead to cynical disregard of the law" would remind one of the words from the Bible:

> "Seeing they see not and hearing they hear not, neither do they understand". (Mathew 13.13)

Similar expression is used in the 'Quran' for the persons who refuse to see reason and return to the right path when it is said in Chapter II Verse 18,

> "Deaf, dumb and blind, they will not return (to the right path)."

Anguish over such types of acquittals can be expressed more appropriately by quoting an Urdu couplet which was cited in the case of Queen Empress v. Pohpi & Ors. reported in **1891 Allahabad (ILR) 171** by Justice Mahmood in his judgment:

Qareeb hai yaar roz-e-mehshar, chhupega kushtonka khoon kyonkar

Jo chup rahegi zaban-e-khanjar, lahu pukarega aasteen ka.

which may be rendered in English as follows:

Oh friend, the day of judgment is near, how can then the blood of the wounded remain hidden

If the tongue of the dagger keeps silent, the blood on the sleeve (of the wounded) will speak out (and point out the assailant).

73. In our opinion so far as two lady accused i.e. accused nos.6 and 7 are concerned they had gone to the place of incident before the men folk. They must have been asked by their men folk to go to the place of incident and make false enquiry, by way of pretext for the assault which they wanted to lodge on the

complainant's party. We cannot be sure whether they were told about their plan to lodge the attack on the complainant's party. No doubt there is evidence of prosecution witnesses who have said that even at the time of assault by the accused persons with sticks these ladies had thrown stones on deceased Louis. Maybe being ladies they had become impulsive on the spur of moment and started throwing stones without knowing the intention of the men folk to murder. The two lady accused may be guilty of simple assault but having been in custody initially for couple of months there is no need to formally hold them guilty for minor offence in an appeal against the order of their acquittal. However, so far as male accused are concerned, apart from being the members of the unlawful assembly having common object to murder the complainant's party they were undoubtedly having common intention even to murder Louis and his sons.

74. In a recent decision in the case of Chittarmal v. State of Rajasthan reported in **(2003) 2 SCC 266** the Supreme Court has held that common object of unlawful assembly referred to under Section 149 and common intention as contemplated under Section 34 may at times overlap which was expressed in para 14 of

the judgment as follows:

> "14. ... Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply."

It was further observed that if the common object does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. This is a case where accused nos.1 to 5 and 8 can be said to be having common object involving common intention which was executed by murder of 72 years' old Louis and his son Remi, a government servant aged about 33 years. The other two sons Jerome and Hygiene could escape from meeting the same fate because they could flee from the place and take refuge in their farmhouse after both of them were wounded.

75. In the result, the order of acquittal of accused nos.6 and 7 recorded by the Addl. Sessions Judge, Sawantwadi in Sessions Case No.16 of 1987 is confirmed and Criminal Appeal No.21 of 1995 against them is dismissed and their bail bonds shall stand cancelled.

Criminal Appeal No.21 of 1995 as against accused no.8-Shankar Sitaram Kothavale in the above Sessions Case has abated as he is reported dead.

We allow Criminal Appeal No.21 of 1995 arising from the above Sessions Case No.16 of 1987 as against accused nos.1 to 5 and convict each of them firstly for offence under Section 302 read with Section 149 of IPC as well as for offence under Section 302 read with Section 34 of IPC for committing the murders of Louis Mingel Fernandes and Remi son of Louis Phillips and sentence each of them to R.I. for life and to pay a fine of Rs.10,000/- in default to suffer further imprisonment for a period of two years. We convict accused nos.1 to 5 for offence under Section 324 read with Section 34 of IPC for assault on complainant Jerome-PW 1 and PW 7 - Hygiene and sentence each of them to RI for one year and to pay a fine of Rs.1000/- each in default to suffer further imprisonment for a period of three months. The said accused nos.1 to 5 are also convicted for offences under Sections 147 and 148 of IPC and sentenced to suffer RI for one year on each count and to pay a

fine of Rs.1000/- each on each count in default each to suffer further imprisonment for three months on either count. Accused Nos.1 to 5 are also convicted for offence under Section 447 of IPC but we see no necessity to award separate sentence for the said offence.

The substantive sentences shall run concurrently.

In view of the above order passed in Criminal Appeal No.21 of 1995, Criminal Appeal No.22 of 1995 for enhancement of sentence imposed on accused no.4 does not survive and the same shall stand disposed of.

Criminal Appeal No.616 of 1994 is dismissed.

In view of the order passed in Criminal Appeal No.21 of 1995, Criminal Revision Application No.336 of 1994 does not survive and shall stand disposed of.

Out of the amount of fine when deposited a sum of Rs.15,000/- shall be paid to each of the widows of deceased Louis Fernandes and Remi Phillips and in their absence to other heirs of the deceased.

On the application of defence Advocates accused nos.1 to 5 are given four weeks' time from today to surrender to their bail bonds. In case they do not surrender by the expiry of a period of four weeks from today they shall be liable to be taken into custody.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)